92-546

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME I

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THE UNITED STATES CONSTITUTION

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

ARTICLE IV

Section. 3. ... The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory of other Property belonging to the Unites States; ...

ACT OF MARCH 3, 1905
[33 Stat. 1006 (1905)]

An Act Providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the *erection* of suitable water, electrical, or power plants, *dams,* wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water: — *Provided,* That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and *with intent*

and ability to use said lands for the purposes above specified and that it requires the quantity of lands applied for in such use, and in case objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section Three of the Act of March second, eighteen hundred and ninety nine, entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian Reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the allottee with full power of alienation be granted to any such appropriator, the Secretary of the

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Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act.

Pub.L. No. 173 ch. 1440, 33 Stat. 1006 (1905) (emphasis added).

ACT OF MARCH 2, 1899
30 Stat., 990

Chap. 374 —An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.[d]

. . . Sec. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for

[d] This act has been repealed as to the Indian Territory and Oklahoma by section 23 of the act of February 28, 1902, post page 114. That act, sections 13-23, post pp. 114-118, makes general provisions for the construction of railroads through the Indian Territory.

such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will

faithfully and impartially discharge the duties of their appointment, which cath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages

rendered by the court shall be final and conclusive.

When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company.

SECTION 23(a) OF THE FEDERAL POWER ACT
[16 U.S.C. § 816] AS OF 1985

SEC 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided*, That when application is made for a license this section for a project or projects already constructed the fair value of said project

of projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of this applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing. [16 U.S.C. 816.]

SECTION 23(b) OF THE FEDERAL POWER ACT [16 U.S.C. § 817] AS OF 1985

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed

construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws. [16 U.S.C. 817]

SUPREME COURT OF THE UNITED STATES

No. A-122

Washington Water Power Company,

Petitioner,

v.

Spokane Tribe of Indians, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 25th, 1992.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 14th day of August, 1992.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE, Plaintiff-Appellant, v. STATE OF WASHINGTON; WASHINGTON WATER POWER COMPANY; UNITED STATES OF AMERICA, Defendants-Appellees.	)	No. 91-35000 D.C. No. CV-82-00753-AAM
SPOKANE INDIAN TRIBE, Plaintiff-Appellee, v. STATE OF WASHINGTON; UNITED STATES OF AMERICA, Defendants, and WASHINGTON WATER POWER COMPANY, Defendant-Appellant.	)	No. 91-35472 D.C. No. CV-82-00753-AAM ORDER

Appeal from the
United States District Court
for the Eastern District of Washington

Before: WRIGHT, HUG, and LEAVY, Circuit Judges

The panel, as constituted in the above case, has voted to deny the petition for rehearing. Judges Hug and Leavy have voted to reject the suggestion for a rehearing en banc, and Judge Wright has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: May 28, 1992.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE, Plaintiff-Appellant, v. STATE OF WASHINGTON; WASHINGTON WATER POWER COMPANY; UNITED STATES OF AMERICA, Defendants-Appellees.	)	No. 91-35000 D.C. No. CV-82-00753-AAM
SPOKANE INDIAN TRIBE, Plaintiff-Appellee, v. STATE OF WASHINGTON; UNITED STATES OF AMERICA, Defendants, and WASHINGTON WATER POWER COMPANY, Defendant-Appellant.	)	No. 91-35472 D.C. No. CV-82-00753-AAM MEMORANDUM*

Appeal from the
United States District Court
for the Eastern District of Washington
Alan A. McDonald,
District Judge, Presiding

Argued and Submitted November 8, 1991
Seattle, Washington

Before:
WRIGHT, HUG, and LEAVY, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The Spokane Tribe of Indians ("the Tribe") brought this action to obtain a declaratory judgment concerning the ownership and title to the bed and northern bank of the Spokane River and the water rights of the river, which lay within the boundaries of the Spokane Indian Reservation.

The district court granted summary judgment in favor of Washington Water Power Company ("WWPC") after finding that the Tribe was collaterally estopped from claiming an ownership interest in the land under the Little Falls Dam and Reservoir by a prior decision in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985). The order of the district court quieted title in the Tribe to certain of the river bed lands associated with the dam "except for that portion of the above-described river bed, if any, which is finally adjudged, after all

avenues of appeal have been exhausted, to have been conveyed in fee simple to Washington Water Power Co. or its predecessor in interest pursuant to the act of March 3, 1905 (33 Stat. 1006)."

The Tribe appeals from that judgment on the grounds that it is not collaterally estopped from establishing its ownership interest to the entire land in question. WWPC appeals the denial of its motion to amend the judgment so as to quiet title in WWPC to that portion of the property which it maintains was held to have been granted to WWPC in the prior Washington Power decision.

The summary judgment is subject to de novo review. A&A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1414 (9th Cir.), cert. denied, 476 U.S. 1117 (1986); Grigsby v. CMI Corp., 765 F.2d 1369, 1373 (9th Cir. 1985). Summary judgment will be affirmed only

when the record, considered in a light most favorable to the nonmoving party, reveals no genuine issue of material fact and establishes that the moving party is entitled to judgment as a matter of law. A&A Concrete, 781 F.2d at 1414.

The doctrine of collateral estoppel precludes parties from relitigating issues already decided by courts of competent jurisdiction. The party seeking to avail itself of the doctrine "has the burden of showing that the issue for which an estoppel is claimed was actually adjudicated in a prior proceeding." Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). Because WWPC did not make the requisite showing in this case, we reverse the district court's grant of summary judgment in favor of WWPC and remand this case for a trial on the merits.

Collateral estoppel applies when (1) there is an identity of issues,

(2) the issue to be precluded actually was litigated and decided in the prior action, and (3) deciding the issue was necessary to the court's judgment. Little v. United States, 794 F.2d 484, 487 (9th Cir. 1986). Since none of these elements is present in the instant case, the district court applied the doctrine incorrectly to the Tribe's ownership claim. The proceedings which culminated in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985), did not address the Tribe's claimed ownership interest in the disputed property. The court in that case merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property. Washington Power does not involve a judicial determination of WWPC's precise property interest in the land under the Little Falls Dam.

A mere similarity between past and present issues will not suffice for purposes of collateral estoppel. The doctrine only applies when the issues are identical in fact. Little v. United States, 794 F.2d 484, 487 (9th Cir. 1986); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 408 (9th Cir. 1985).

The two issues that were resolved in Washington Power were (1) "whether Washington Power prior to June 10, 1920, possessed a 'valid existing right-of-way' to 'operate or maintain [a] dam' at Little Falls on the Spokane River," Washington Power, 775 F.2d at 311, and (2) "whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act. FPA, 16 U.S.C. §§ 816 and 817." Washington Power, 775 F.2d at 323. Neither issue implicates the Tribe's claimed ownership

interest in the land. Since the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with Washington Power, the Tribe is not collaterally estopped from asserting its ownership claim. WWPC could have a valid right-of-way over land that is owned by the Tribe.

In addition to the difference between the issues raised in the instant case and those raised in Washington Power, collateral estoppel is also inappropriate because the Tribe's ownership interest was never actually litigated during the Washington Power proceedings. Consequently, the second requirement of collateral estoppel is also lacking in this case. Collateral estoppel will not attach to issues which were never actually litigated or to claims precluded from being raised in earlier proceedings. Clark-Cowlitz Joint Operating Agency v.

F.E.R.C., 826 F.2d 1074, 1079 (D.C. Cir. 1987), cert. denied, 485 U.S. 913 (1988); I.A.M. Nat'l Pension Fund v. Industrial Gear Mfg. Co., 723 F.2d 944, 947-49 (D.C. Cir. 1983).

Although the Tribe intervened in the proceedings before the FERC because it believed that its potential ownership interest could be adversely affected during those proceedings, it never had an adequate opportunity to litigate its claim. The FERC granted the Tribe's motion to intervene but then declined to address the issues raised by the Tribe. The FERC stated this outright as follows:

> The resolution of [the Tribe's ownership claim] is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding. These actions will, however, be considered on their face in determining whether WWPC

> received a permit or a valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.
>
> . . . The decision will not address questions of land titles, water rights, compensation, or Spokane Tribal rights, since these are clearly extraneous to a determination of the threshold jurisdictional question.

The FERC proceedings were the subject of the appeals that culminated in the Washington Power decision, and the only issue ever litigated during those proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act.

Finally, we find that collateral estoppel does not bar the Tribe's claim because the third element of the collateral estoppel doctrine also fails. Determining the Tribe's interest in the

disputed property was not necessary to the holding in Washington Power. To determine whether WWPC qualified for the licensing exception to the Federal Power Act, the court only had to determine whether WWPC had obtained an interest or right-of-way prior to 1920. Whether WWPC owned a fee interest, an easement, or a right-of-way was irrelevant for purposes of determining whether WWPC needed to be licensed. Consequently, the Tribe is not collaterally estopped from litigating its claim.

The summary judgment is reversed and the case is remanded to the district court for further proceedings. The appeal by WWPC of the order denying its motion to amend the judgment is moot because of our reversal of the summary judgment. WWPC remains a party in this litigation and the wording of any judgment entered on remand

will be as a result of further proceedings before the district court.

DATED: March 12, 1992.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	)	No. C-82-753-AAM ORDER RE WWP AND LITIGATION SCHEDULE

Before the court for resolution are six motions: (1) Defendant Washington Water Power Company's (WWP) Motion for Partial Summary Judgment (I) (Ct. Rec. 18); (2) Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 81); (3) Defendant WWP's Motion for Summary Judgment (II) (Ct. Rec. 83); (4) Plaintiff's Motion to Strike Affirmative Defenses of WWP (Ct. Rec. 98); (5) Defendant WWP's Motion to Compel Discovery (Ct. Rec. 127); and (6)

Defendant WWP's Motion in Limine (Ct. Rec. 126). All were heard with oral argument on November 9, 1989 in Yakima, Washington. For the following reasons, and for the reasons stated by the court at the conclusion of the hearing, Defendant WWP's second Motion for Summary Judgment is granted; the plaintiff's Motion for Partial Summary Judgment is accordingly denied; and the remaining motions are denied as moot, WWP having now been dismissed from this action.

I.

This action was commenced in 1982 by the Spokane Tribe of Indians (Tribe) primarily for the purpose of obtaining a judgment as to the ownership of the bed of the Spokane River as it lies between the eastern and western borders of the Spokane Indian Reservation. Named as defendants were the State of Washington (State) and WWP. As to WWP specifically,

the Tribe contests the ownership of those lands associated with the construction and operation of the Little Falls Dam and reservoir; see Ct. Rec. 1 at 12, ¶ "3" and "4".

In Washington Water Power Co. v. F.E.R.C., 775 F.2d 305, 336 (D.C. Cir. 1985), the court held:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right-of-way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development.

Defendant WWP asserts that based on the doctrine of collateral estoppel, the holding in F.E.R.C. should be given preclusive effect in this proceeding, thus entitling it to summary judgment as to the

Tribe's claim to this portion of the River.

A rather articulate statement of the law of collateral estoppel, or issue preclusion, can be found, ironically enough, in Judge Mikva's dissent in F.E.R.C. at 341:

> The policy behind the doctrines of res judicata and collateral estoppel is to prevent relitigation of issues that were, or should have been, previously tried. See 18 C. Wright, A. Miller & E. Copper, Federal Practice and Procedure § 4403 (1981). One reason for this preclusion is to keep a party from being forced to go through the trouble and expense of relitigating a point is has already won. Id.; United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Although there is no longer a firm requirement of mutuality of parties between the two suits, Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), a litigant seeking to invoke collateral estoppel must still show that
>
> (1) the issue must have been actually litigated;

> (2) the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial; and
>
> (3) preclusion in the second trial must not work as unfairness.
>
> Jack Faucett Associates. Inc. v. American Telephone and Telegraph, 744 F.2d 118, 125 (D.C.Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985), citing Otherson v. Dept. of Justice, INS, 711 F.2d 267, 273 (D.C.Cir. 1983).

Accord Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); see also University of Tennessee v. Elliott, 478 U.S. 788 (1986).

Upon application of this test to the issue at bar, the court finds the Tribe collaterally estopped from asserting an ownership interest in the land occupied by the Little Falls Dam and reservoir. In particular, the court would note first, on analyzing the F.E.R.C. decision as a

whole, that there can be little doubt that this issue was actually litigated and the conclusion reached necessary to that holding.[1] And second, the court would observe that the very purpose of the Tribe's presence as intervenor in F.E.R.C. was to present its views in this regard. Accordingly, on this basis, and for the reasons stated by the court at oral argument,

---

[1] See, e.g., F.E.R.C., 775 F.2d at 323:

> Having settled that the 1905 Act authorized the Secretary to grant parties the necessary right of way and approval to build, maintain, and operate the Little Falls Facility, 'in the Spokane River along the southern boundary of the Spokane Indian Reservation,' see n.2, the central question of this case becomes whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act.

IT IS HEREBY ORDERED, pursuant to Fed. R. Civ. P. 56, that Defendant WWP's second Motion for Summary Judgment be GRANTED.

Based on the foregoing, IT IS FURTHER ORDERED that the plaintiff's Motion for Partial Summary Judgment, which deals strictly with that portion of the River being claimed by WWP, be DENIED.

WWP now no longer a party to this action, IT IS FURTHER ORDERED that defendant WWP's first Motion for Partial Summary Judgment, Motion to Compel Discovery, and Motion in Limine, as well as the plaintiff's Motion to Strike, be DENIED AS MOOT.

II.

Remaining for resolution in this matter is any interest the Tribe may have in that portion of the bed of the Spokane River adjacent to its reservation, exclusive of the Little Falls Dam and

reservoir, vis-a-vis the State of Washington; see Complaint, Ct. Rec. 1 at 11-12, ¶ "1" and "2."[2] As to those issues, the following schedule shall apply:

(1). The non-jury trial shall commence on July 23, 1990 at 9:30 a.m. in Spokane, Washington.

(2). All discovery shall be completed on or before May 25, 1990. The parties shall file no discovery materials except as necessary to support motions.

(3). Each party shall file and serve a final witness list on or before June 1, 1990. These lists shall contain the name, address and a summary of each witness' testimony. These lists shall not be supplemented, except for rebuttal, without leave of the court to prevent manifest

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[2] Based upon counsel's representation at the November 9, 1989 hearing, the State now disclaims any interest in that portion of the Spokane River bed being claimed in this action by WWP.

injustice. The discovery costs, including attorney fees, of any witness listed but not called to testify shall be borne by the party and/or attorney so listing the uncalled witness, subject to review by the court to prevent a manifest injustice. Objections to witnesses shall be filed and served on or before June 8, 1990, along with a brief summary of the basis for the objection(s).

(4). Final exhibit lists shall be filed and served and exhibits made available for inspection (or copies provided) on or before June 1, 1990. Objections to exhibits shall be filed and served on or before June 8, 1990, and two copies of the exhibit(s) to which objections are filed shall be furnished by counsel, together with a brief summary of the basis for the objection(s). All exhibits shall be pre-marked BY COUNSEL. Plaintiff shall utilize exhibit numbers 1

through 99. Defendant(s) shall utilize numbers 100 through 199.

(5). All motions shall be served, filed and disposed of prior to June 22, 1990.

(6). The pretrial conference will be held on July 6, 1990, at 11:00 a.m., in Yakima, Washington. If an agreed Pretrial Order has been lodged prior to that date, counsel need not appear at the pretrial conference.

(7). Trial briefs and proposed Findings of Fact and Conclusions of Law shall be filed and served on or before July 16, 1990.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DONE BY THE COURT this 5th February, 1990.

ALAN A. McDONALD
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	)	No. C-82-753-AAM ORDER DENYING MOTION FOR RECONSIDERATION

Before the court for resolution without oral argument is the plaintiff's Motion for Reconsideration (Ct. Rec. 140). Although no Notice of Hearing was filed, it appears to the court that the record is now complete and thus that this matter is ripe for disposition.

By an order entered February 8, 1990, the court granted Defendant WWP's motion for summary judgment on the basis of collateral estoppel, or issue preclusion. Ct. Rec. 138. Specifically, the court

found that the question of the ownership of the Spokane River bed as it lies upstream from the Little Falls Dam and reservoir to the eastern border of the Spokane Indian Reservation was decided in favor of WWP in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985). Id. at 2-4. See also Transcript of Proceedings, Ct. Rec. 139. The plaintiff now moves for reconsideration of that ruling pursuant to Fed. R. Civ. P. 54(b).

As stated by the plaintiff,

> [t]he issue [presented by this motion] is whether the 1905 Act and the grants that the Secretary of Interior was authorized to make under that Act were intended by Congress to accomplish a taking of the Tribe's entire ownership interest in the lands referred to in the grants, as TWWPC contends, or whether such grants were intended only to provide a right-of-way license or easement over and across tribal lands with the underlying ownership interest retained by the federal government held in trust for the Plaintiff Spokane Tribe of

> Indians as the Spokane Tribe contends.

Ct. Rec. 141 at 3. As the court held previously, it finds the former characterization to be the holding of the court in F.E.R.C.

The court is cognizant of the fact that, as a threshold matter, the issues presented for resolution in F.E.R.C. differed from those presented here. In F.E.R.C., the precise issue before the court was whether WWP was granted a "valid existing right-of-way [to operate the Little Falls hydroelectric development] . . . prior to June 10, 1920" so as to exempt WWP from the licensing requirements of the Federal Power Act. 775 F.2d at 310-11 (emphasis omitted) (quoting § 23(b) of the Act, 16 U.S.C. § 817). But in deciding that issue, the F.E.R.C. court did not simply decide whether or not WWP was granted such a right-of-way; instead,

it chose to analyze the question by determining first what interest, if any, WWP had in this land, and second, whether such interest constituted a right-of-way for purposes of the Act. In deciding the first question, the court relied heavily on the language contained in the Act of March 3, 1905 (which is reproduced in its entirety at 308-9 n.2), which provides "for the acquirement of water rights . . . [and] lands on said reservation for sites for power purposes" (emphasis supplied).[1] See F.E.R.C., 775 F.2d at 308-10. Upon review of the 1905 Act, and the acts

---

[1] See also Sec. 2 of the 1905 Act ("the Secretary of the Interior [is] authorized and empowered to grant such appropriator . . . land on said reservation . . . as shall be necessary and requisite . . . for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water") (emphasis supplied); Sec. 3 (providing that compensation be paid to the Tribe for lands acquired pursuant to this Act by those acquiring it).

performed by WWP pursuant to that Act, the court concluded at 336:

> (1) The Washington Water Power Company . . . now owns the rights, title, interests, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development; [and] (2) prior to June 10, 1920 such rights, etc., were acquired and granted in accordance with the special Act of March 3, 1905 . . .

From these findings, the court then concluded, also at 336, that "(3) the continuous operation and maintenance of the Little Falls Power Development by the Washington Water Power Company is exempted from the application of the Federal Power Act by sections 23(a) and (b)." It was thus necessary to the decision in F.E.R.C. that WWP was granted, pursuant to the 1905 Act, all Reservation land essential for the construction and operation of the Little Falls hydroelectric development, as that finding served as the basis for its

finding that such interest constituted a right-of-way over such land for purposes of the Federal Power Act. The court therefore again finds the plaintiff collaterally estopped from relitigating the issue of the ownership of this property and all rights appurtenant thereto; see Restatement (Second) of Judgments § 27. Accordingly,

IT IS HEREBY ORDERED that the plaintiff's motion for reconsideration be DENIED.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

DATED: April 5, 1990.

ALAN A. McDONALD
United States District Judge

No. 91-35000 - No. 91-35472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON;
WASHINGTON WATER POWER COMPANY;
UNITED STATES OF AMERICA,
Defendants-Appellees.

* * *

SPOKANE INDIAN TRIBE,
Plaintiff-Appellee,
vs.
STATE OF WASHINGTON;
UNITED STATES OF AMERICA,
Defendants,
and
WASHINGTON WATER POWER COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
Alan A. McDonald, District Judge, Presiding
D.C. No. CV-82-00753-AAM

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*
THE WASHINGTON WATER POWER COMPANY
Appellee and Appellant
APPENDIX ATTACHED

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I. PETITION FOR REHEARING.

A. STATEMENT OF ISSUES PRESENTED FOR REHEARING.

1. Did the Memorandum decision filed by this Court on March 12, 1992, properly apply the doctrine of collateral estoppel? Is the Spokane Indian Tribe barred by the doctrine of collateral estoppel or issue preclusion from re-litigating the issues of fact and law decided in Washington Water Power Co. v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C.Cir. 1985) (hereafter "WWP v. FERC") since the Spokane Indian Tribe provoked the proceeding which culminated in WWP v. FERC, was a full participating party in the WWP v. FERC proceeding, and where the substantive rights of WWP were at issue and were resolved?

2. Should this Ninth Circuit Court of Appeals have reversed the judgment and decision of the district court which was

at issue in Circuit Court Docket No. 91-35472? Where a judgment quieting title to WWP's property was obtained by Tribal ex parte communications with the district court without notice to WWP, should this Circuit Court have clearly rebuked such *ex parte* communications and clearly reversed the judgment of the district court rather than simply ruling that "the appeal by WWPC of the order denying its motion to amend the judgment is moot..."?

3. Should the opinion of this Circuit Court be clarified with respect to the following:

(a) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating the lawfulness of the construction, operation and maintenance of the Little Falls Development;

(b) the application of the doctrine of issue preclusion to bar the Tribe from claiming any damages from WWP for conduct which was authorized by Congress and the Secretary of the Interior as decided in WWP v. FERC;

(c) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating all issues of fact and law decided by the D.C. Circuit Court of Appeals in WWP v. FERC;

(d) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating any issue relating to WWP's ownership of a limited fee with implied reverter for non-use, as concluded in WWP v. FERC, *supra* at 325, and also in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash 1941);

(e) to reverse the judgment and decree quieting title to property in the Tribe with respect to WWP's property and to hold that the *ex parte* communications of the Tribe with the court without notice to WWP were clearly unlawful and in violation of WWP's rights.

B. SUBJECT MATTER AND APPELLATE JURISDICTION.

The above-entitled matter arose by virtue of a complaint filed by the Spokane Indian Tribe. The district court had original jurisdiction under 28 U.S.C.A. § 1362 (1986). In addition, the issues raised involved rights acquired by WWP under a Congressional Act of March 3, 1905 [33 Stat. 1006]. In addition, the Tribe makes claims under an Executive Order of the President of the United States and under case law of the federal courts. Therefore, the matter involves issues

arising under the Constitution and laws of the United States, and the district court had jurisdiction under 28 U.S.C.A. § 1331 (1986). Finally, the matter involves an appeal of a final decision of a district court. Therefore, this Circuit Court of Appeals has jurisdiction under 28 U.S.C.A. § 1291 (1986).

C. STATEMENT OF THE CASE.

1. History of Proceedings.

This case arose from the same facts and issues that were presented to the Federal Energy Regulatory Commission (FERC) and to the D.C.Circuit Court of Appeals in WWP v. FERC. In the district court below, the Tribe sought a declaration of its title to WWP's lands along the Spokane River and sought damages for WWP's construction, operation and maintenance of WWP's Little Falls Hydroelectric Development (Supp. Excerpt at 447, 458), which power project was at

issue and was fully discussed in WWP v. FERC. All of the relevant facts and issues are fully discussed in WWP v. FERC with the exception concerning the facts relating to collateral estoppel and the manner in which that issue arose in the district court.

In the district court below, WWP moved for summary judgment and argued that the Tribe was barred from contesting WWP's title and was barred from claiming damages based upon the doctrine of collateral estoppel. WWP claimed that all of the material facts and legal issues concerning WWP's legal rights to construct, operate and maintain the Little Falls Development were fully litigated and decided in WWP v. FERC. The district court granted WWP's motion for summary judgment based upon collateral estoppel and dismissed tne Tribe's complaint against WWP. The Tribe also sought a declaration of title against

the State of Washington. In subsequent proceedings, the remaining issues against the State of Washington were set for trial and ultimately resolved. Finally, through *ex parte* communications with the court and without notice to WWP, the Tribe sought and obtained a stipulated judgment (stipulation between the State of Washington and the Tribe to the exclusion of WWP) and obtained a judgment quieting title to the property claimed by WWP. Upon receiving notice of the entry of such judgment, WWP objected to such judgment and moved to amend such judgment to exclude WWP's property. The district court held that the judgment quieting title did not apply to WWP but denied WWP's motion to amend the judgment to exclude WWP's property. Copies of all of the decisions of the district court are attached as appendices to this Brief.

The Tribe appealed the summary judgment of dismissal of the complaint in Circuit Court Docket No. 91-35000. WWP appealed the judgment quieting title in the Tribe to WWP's property in Circuit Docket No. 91-35472.

2. Facts.

The relevant and material facts are summarized and stated in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C.Cir. 1985) (again, hereafter "WWP v. FERC"). Where relevant, citations will be made to WWP v. FERC with respect to certain facts. A copy of WWP v. FERC is attached at Appendix __ for ease of reference.

In WWP v. FERC, the Spokane Tribe of Indians was an intervenor (p. 305). WWP was represented by Robert D. Dellwo, the same Robert D. Dellwo in the law firm that represented the Tribe before the district court and the circuit court (p. 307). In

WWP v. FERC, WWP claimed it constructed, operates and maintains the Little Falls Project under the authority of a Special Act of Congress approved on March 3, 1905. In 1905, David Wilson, a private developer, wanted to develop a power site on the Spokane River, part of which was within the Spokane Indian Reservation (p. 308). Mr. Wilson petitioned his representative in Congress who sponsored a bill to provide for acquiring water rights and land for power site purposes (pp. 308-309). The law is set forth in full at page 309. David Wilson appropriated water and the Secretary of the Interior "acting in accordance with the 1905 Act, granted the 100 acres and the right to use the waters" to David Wilson (p. 309). David Wilson's lands and water rights were sold to WWP in 1907 and in 1908, WWP began construction of the Little Falls Development. *Id.* In 1908, WWP purchased an

additional eight acres for the Little Falls Development (p. 310). WWP's Little Falls Dam began producing electric power in 1910. *Id.* The D.C. Circuit Court of Appeals held that WWP was not required to apply for or obtain any additional license or authority to continue to operate and maintain the existing Little Falls Project. *Id.* The 1905 Act authorized David Wilson and WWP to appropriate water by complying with Washington state law for a hydroelectric development (p. 312).

The 1905 Act provided the exclusive means for compensation to be paid to the Spokane Indians (p. 313). The 1905 Act finally provided for the granting of land and permanent land rights that may be necessary to construct, operate and maintain a power project such as the Little Falls Development. *Id.* The land rights included the bed of the river. *Id.* and p. 316. The land rights included the

bed of the river. *Id.* and pp. 317-318. Such rights included the right to excavate and construct a dam and to store and divert waters of the Spokane River at Little Falls (p. 319). The grant to David Wilson which was sold to Water Power included the land and the water rights. *Id.* at p. 320. It should be noted that the nature of the rights acquired under the 1905 Act was litigated and determined in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash. 1941).

It is clear that the D.C. Circuit Court determined that the 1905 Act authorized the Secretary of the Interior to grant lands to Mr. Wilson and thereafter to WWP. *See* Section 2 of the Act of 1905 shown in note 2 on page 309, and *see* page 325. It is further clear that the District of Columbia Circuit Court of Appeals concluded that WWP owns real property and that the nature of such real

property is a "transferrable limited fee currently held by the Company." Page 325. The District of Columbia Circuit Court stated that:

> Thus the Commission proposes actually to obliterate the right of way for the beneficial use of its water rights that the Company currently holds, a limited fee with implied reverter for non-use, *see Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), by forcing it [WWP] to apply for a license to run for a 50-year term, at the end of which the right to maintain and operate the dam would be up for license.

Id. It is also clear that the Circuit Court concluded that from 1911 on, WWP had all of the authority and rights necessary for the construction, operation and maintenance, and for the continuing operation and maintenance of the Little Falls Project. Page 326 and pages 335 and 336. The D.C. Circuit Court of Appeals finally concluded that:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and *now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls development* ...

It also is clear that the D.C. Circuit Court concluded that WWP now holds a limited fee with an implied reverted for non-use to the Little Falls development site. Page 325.

In 1989, WWP moved for summary judgment based upon collateral estoppel and issue preclusion based upon the decision in WWP v. FERC. The District Court ruled in favor of WWP and issued an order dated February 8, 1990, and an Order Denying Motion for Reconsideration dated April 5, 1990, copies of which are attached and are set forth in the Excerpt in appeal Docket No. 91-35472, pages 31-36

and pages 63-66, as Appendices __ and __, respectively. On September 14, 1990, the Tribe obtained, by *ex parte* communications with the court, a "Judgment and Decree Confirming Disclaimer and Quieting Title to Property." Excerpt at 102, a copy of which is attached, Appendix __. WWP moved the court to alter and amend judgment, which motion was denied by the court. The motion is in the excerpt at page 111. The order denying WWP's motion is set forth in Excerpt at 143 and is attached in the Appendix.

II. RELIEF SOUGHT

WWP seeks rehearing of the issues relating to collateral estoppel and issue preclusions, and particularly seeks an order of this Court ruling that all of the facts and issues of law decided by the court in WWP v. FERC are binding on the Tribe in the proceedings which are the subject matter before this Court. WWP

believes that the court erred in issuing its memoranda relating to collateral estoppel and in reversing and remanding the matter, in light of the decision of the United States Supreme Court in University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986). WWP urges this Court to clarify its decision relating to the application of the doctrine of collateral estoppel as it relates to the facts and issues of law decided in WWP v. FERC. Finally, WWP urges this Court to expressly reverse and remand the Judgment and Decree Quieting Title in the Tribe to WWP's property. The effect and decision of this Court is perhaps unclear as it relates to Appeal No. 91-35472. (It should be noted that the Tribe and WWP have filed a cost bill for both appeal Docket No. 91-35000 and Docket No. 91-35472.) The undersigned attorneys believe that this Court intended to

reverse the District Court in Appeal No. 91-35472.

III. BASIS FOR PETITION FOR REHEARING

1. The memorandum of the court "overlooked" material points of fact and law in its decision.

2. There is an apparent conflict between the decision of the Ninth Circuit Court of Appeals and the decision of the D.C. Circuit Court of Appeals in WWP v. FERC.

3. The memorandum of the court did not clearly reverse the District Court in Appeal No. 91-35472, even though such reversal appears to have been intended and under the facts and law and is clearly required.

The undersigned attorneys believe that the above stated situations exist in this Court's Memorandum filed on March 12, 1992. Furthermore, the undersigned attorneys believe that the full court

should consider the issues that are raised, particularly as they relate to the application of the doctrine of issue preclusion where a detailed and substantial administrative hearing and court opinion has been issued dealing with the same facts and the same issues of law and particularly where such court opinion is issued by a sister Circuit Court of Appeals in a proceeding which was provoked by the party against whom the doctrine of issue preclusion is to be applied. Furthermore, WWP contends that the Memorandum of this Court filed on March 12, 1992, either directly conflicts or could lead to an opinion which conflicts and would substantially affect the opinion of another court. There is a need for substantial uniformity in the application of the doctrine of issue preclusion. Finally, the memorandum of this Court filed on March 12, 1992, may encourage

persons to engage in conduct similar to the conduct of the Tribe in conducting *ex parte* communications with a district court and in obtaining *ex parte* judgments and orders with no rebuke and not even with an express reversal by this Court. Therefore, WWP has suggested that this matter should be reheard *en banc*.

IV. ARGUMENT

The first and foremost argument made by WWP in this case is based upon the claim by WWP that the Tribe should be barred by the principals of issue preclusion in prior decisions and fact determinations from making claims for money damages and claims of title to property inconsistent with WWP's rights, title and interest that were clearly at issue and were decided in WWP v. FERC. WWP bases its argument on the principals of issue preclusion which were established in

University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986) (hereafter cited as "*Elliott*"). *Elliott* involved two proceedings -- a state administrative proceedings and a proceeding before a federal district court. *Id.* at 790. In Elliott,

> [t]he ALJ [Administrative Law Judge] held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims, but did allow respondent to present, as an affirmative defense, evidence that the charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge."

Id. at 791. This is substantially analogous to the same situation that was described by this Court in its Memorandum at page 6. A copy of this Court's Memorandum is attached in the Appendix as Appendix __. In Elliott, the ALJ found "that the charges were not racially motivated in a labor dispute." *Id.* In Elliott, the plaintiff did not seek review

of the administrative proceeding but rather returned to the federal district court to pursue his civil rights claims. *Id.* at 792. In Elliott, the University moved for summary judgment "on the ground that respondent's suit was an improper collateral attack on the ALJ's ruling, which petitioner [University] contended was entitled to preclusive effect." *Id.* at 792. The U.S. Supreme Court granted *certiorari* to consider whether the "State administrative fact finding is never entitled to preclusive effect in actions under Title VII or the Reconstruction Civil Rights statutes." *Id.* at 794.

In Elliott, the United States Supreme Court recognized that "we have frequently fashioned federal common-law rules of preclusion in the absence of the a governing statute." *Id.* The court concluded that a preclusion statute (28 U.S.C. § 1738) did not bar giving

preclusive effect to administrative agency decisions and that the court should consider whether the "rule of preclusion is appropriate ... ." *Id.* at 794-795. The court discussed the reasons for and the advantages and the desirability of precluding re-litigation of issues where such issues have been previously litigated. *Id.* at 798-799. Therefore, the court, in Elliott stated:

> We hold that when a state agency 'acting in a judicial capacity ... resolves disputed issues of fact properly before it when the parties have had an adequate opportunity to litigate,' (citation omitted) federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.

Id. at 799.

It is the principles and doctrine of issue preclusion of the facts and law which WWP contends that this Court erroneously applied in its Memorandum filed on March 12, 1992. WWP urges the

Court to follow the federal common-law principles expressed and explained in Elliott and apply those principles to this case.

In its Memorandum, this Court has followed a strict construction approach concerning the application of the doctrine of collateral estoppel. The Court cited Harris v. Jacobs, 621 F.2d 341 (9th Cir. 1980), and Little v. United States, 794 F.2d 484 (9th Cir. 1986). It does not appear that either of the cases cited or this Court in this case considered or dealt with preclusion issue as discussed in Elliott. Rather, this Court made a cursory determination that the D.C. Circuit Court "merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property." Memoranda at page 4. This

Court went on to conclude that WWP v. FERC did not "involve a judicial determination of WWPC's *precise* property interest in the land under the Little Falls Dam." *Id.* This Court's Memorandum begs the question. What is obvious from the opinion in WWP v. FERC is that the "precise" issue before the court was whether or not WWP had all of the rights, title and interests necessary for the construction, maintenance and operation of the Little Falls Project. As discussed in the Statement Of The Case above, the D.C. Circuit Court determined WWP's rights, title and interest in order to determine whether or not the Little Falls Project was exempt from licensing under the Federal Power Act. What is clear from WWP v. FERC and what cannot be disputed is that the D.C. Circuit Court determined that WWP had all of the rights, title and interest necessary for the construction,

operation and maintenance of the Little Falls Project and that granting of such rights by the Secretary of the Interior was authorized by Congress and that the Secretary of the Interior did grant such rights and that WWP's construction, operation and maintenance of the Little Falls development was wholly lawful and therefore, of necessity, WWP was not required to license the Little Falls Project under the Federal Power Act. *See* the Statement Of The Case, above. The record that was before the FERC and before the court in WWP v. FERC is substantially discussed in WWP v. FERC, which record was also presented to the District Court below, the relevant parts of which were presented to this Court in the Supplemental Excerpts filed by WWP in Docket No. 91-35000 and the Excerpt filed in Docket No. 91-35472. In addition, the FERC record was substantially addressed in

the briefs filed by WWP in the aforementioned appeals. Finally, the Act of 1905, which is the genesis of WWP's rights, title and interest, was discussed in great detail, of necessity, in WWP v. FERC. The legal effects of such statute, when applied to the facts presented to this Court, led this Court to determine the issues of fact and law, including some discussion of the nature of WWP's "precise property interest in the land." WWP v. FERC, *supra* at 325.

Finally, of necessity, the court in WWP v. FERC determined that WWP's construction, operation and maintenance of the Little Falls development is lawful under lawful rights granted by the federal government pursuant to an act of Congress. If the actions and conduct of WWP were once determined to be lawful and pursuant to an Act of Congress after a full opportunity to litigate was given to the

Tribe and to the United States government in an administrative proceeding and before the D.C. Circuit Court of Appeals, isn't the Tribe now be barred from re-litigating its claim for damages with respect to the construction, operation and maintenance of the Little Falls Project under the principles of issue preclusion expressed in *Elliott* are applied? If the strict construction espoused in the Memoranda are followed, unless the pleadings or the issues that are presented appear to be *precisely* the same issues that have been presented in a prior proceeding, it does not appear that any party will ever be precluded from re-litigating issues. The only barrier will be the ability of an attorney to conjure up some distinction between the "precise" issues presented in the first proceeding and the "precise" issues presented in a second proceeding. Such strict construction completely

eviscerates the apparent principles laid down in Elliott.

The strict construction of the doctrine of collateral estoppel determined by this Court in its Memoranda seems to be more akin to the doctrine of "*res judicata*" rather than the doctrine of collateral estoppel or issue preclusion. It is suggested that under the principles of issue preclusion expressed in Elliott, all factual determinations and legal issues decided in WWP v. FERC should be considered to preclude any further litigation concerning such issues. If this Court, upon consideration of this Petition or Rehearing, still concludes that the Tribe may still litigate the "precise property interest" held by WWP or the Tribe, the other claims for damages of the Tribe with respect to the construction, operation and maintenance of the Little

Falls Project should be held to be precluded and determined in WWP v. FERC.

WWP can defend against the Tribe's appeal on any ground properly raised below regardless of the ruling of the District Court. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 at n. 20, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979). Failure to give preclusive effect to the determinations made by the D.C. Circuit Court of Appeals in WWP v. FERC may ultimately lead to a complete evisceration of the decision in WWP v. FERC. For example, if the District Court, on remand, is not bound by the determinations in WWP v. FERC, the District Court conceivably could rule that WWP never acquired all of the rights, title and interests that were necessary for WWP's construction, operation and maintenance of the Little Falls development. If WWP did not have all of the rights that were necessary for the

construction, operation and maintenance of Little Falls, then Section 23 of the Federal Power Act would not exempt the project from licensing and then WWP could then be required to go back to the FERC and license the Project under the Federal Power Act. It is clear that in *WWP v. FERC*, WWP and the Tribe and the United States has already litigated that issue. How or why should WWP be further exposed to liability and loss of its property through litigation in a second forum? WWP v. FERC, *supra* at 325. This appears to be clearly inconsistent with the principles of issue preclusion laid down in Elliott. Therefore, this Court should rehear and reconsider its Memorandum decision issued on March 12, 1992, with respect to Docket No. 91-35000.

Finally, this Circuit Court should clarify its decision with respect to Docket No. 91-35472. That appeal deals

with a judgment and decree entered by the District Court upon *ex parte* communications made by the Tribe. As explained in WWP's initial brief and reply brief, such conduct on the part of the Tribe was clearly unlawful and improper and in violation of various rules of court, and in violation of WWP's rights. In its Memorandum at page 7, this Court simply stated that WWP's appeal is "moot because of our reversal of the summary judgment." Furthermore, the court stated that "the wording of any judgment entered on remand will be a result of further proceedings before the District Court." Although the effect may be clear, it is urged that with respect to Docket No. 91-35472, the Memorandum should clearly show that the judgment and decree entered by the Court in September 1990 is reversed and remanded for further considerations consistent with the opinion of the Court.

V. CONCLUSION

This Court should give further consideration to the issues raised in Docket No. 91-35000 concerning the federal common-law of issue preclusion, the principles of which were discussed in University of Tennessee v. Elliott, 478 U.S. 788, 796-799, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986). The record before this Court and the decision in WWP v. FERC clearly shows that the facts and legal issues which are at the heart of this case were litigated by the parties, including the Spokane Tribe of Indians and WWP, before the FERC and before the D.C. Circuit Court of Appeals. In WWP v. FERC, the Spokane Tribe was the real party in interest as recognized by the dissent at page 341. Following the principles of issue preclusion laid down in Elliott, certainly all of the facts and legal issues decided in WWP v. FERC should be

given preclusive effect by this Court, and if there are any remaining issues to be remanded to the District Court, then by the District Court in its subsequent proceedings. Finally, the Memorandum filed on March 12, 1992, should be clarified to show that the judgment and decree at issue in Docket No. 91-35472 was reversed, and if deemed necessary, remanded to the District Court for further proceedings.

DATED this 25th day of March, 1992.

PAINE, HAMBLEN, COFFIN, BROOKE
& MILLER

By_____
Jerry K. Boyd
Attorneys for
defendant/appellee
Washington Water Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	
v.	)	COMPLAINT
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

The Spokane Indian Tribe, by and through the undersigned, petitions and alleges:

1. The Spokane Tribe of Indians, hereinafter referred to as the "Tribe" or the "Spokane Tribe" is a federally recognized Indian Tribe formally and legally organized with a Constitution adopted by its members and approved by the Department of Interior. The Tribe is authorized to bring this action in this Court and the Court has jurisdiction to

litigate its claims herein by virtue of 28 USC 1331 and 1362.

2. Before federal recognition and formal organization the Spokane Tribe existed from time immemorial - fully recognized and acknowledged to be a Tribe by the earliest settlers, trappers, missionaries and governmental representatives. At the time of the first visits of the white man to this area it was composed generally of three main bands or sub groups now identified as the "Upper, Middle and Lower Spokanes," but constituted a single Tribe.

3. From time immemorial the Tribe and its members, bands and groups occupied as their aboriginal lands approximately 4,500,000 acres of land bounded on the west by the Columbia River, on the east by the Pend Oreille River, on the north by a line roughly approximating the present international boundary between the United

States and Canada and on the south and southeast by a geographic line roughly extending from what is now the center of the Spokane Valley - to Rockford, south to Tekoa, west through Spangle and circling to the south and west of Ritzville and back to the Columbia River. This occupation of that vast territory by the Tribe was from the earliest of times recognized by other Tribes, by geographers and historians and by the United States government as conclusive evidence of the Tribe's aboriginal ownership of those lands. While the Spokane Tribe historically permitted neighboring Tribes to visit and utilize its lands, it too visited and utilized the lands of these other Tribes particularly in hunting and gathering expeditions into what is now Idaho and Montana.

4. Beginning in the early 1800's and accelerating during the rest of the

Nineteenth Century, there was a rapidly increasing influx of white explorers, hunters, fishermen, trappers, missionaries, farmers, business entrepreneurs and other settlors into these Tribal aboriginal lands. Most of the cities and towns now located therein were begun. These people were United States citizens coming to what they considered "their" new country and establishing claims of ownership through squatting, residence, mining claims, railroad rights-of-way, homestead entry and through every method and means available to those early people to seek ownership or occupancy rights in portions of Tribal lands.

5. Contingents of the United States Army came to the area establishing forts and headquarters from which to explore and control the lands and their Indian and non-Indian residents. The combination of all these non-Indian people and their

federal protectors eventually constituted a powerful political force upon the United States government to seek the extinguishment of Indian title and to establish a Reservation to which to sequester and maintain the Tribe.

6. During this time the Tribe and its chiefs were attempting to cope with the influx of non-Indians and non-Indian interests which were effectively gobbling up and preempting large ares of their homeland so that in many cases they were being driven off and excluded from their own homes. They anticipated the inevitable loss of their lands and communicated to the United States authorities their desire for the establishment of a Reservation in which their land rights, though vastly reduced, would be protected in perpetuity.

7. At the request of the Tribe the United States government in 1877 sent a

parley commission headed by United States Indian Inspector E. C. Watkins to Spokane Falls, Washington, to conduct a parley with the Spokane Indians the purpose of which was to gain their cession of their aboriginal lands in return for the establishment of a Reservation on the key portion thereof. The parley, conducted in Spokane August 16 through August 18, 1877, resulted in the following agreement:

"Council at Spokane Falls, W. T.

August 18th, 1877

We the undersigned chiefs and headmen of the Spokane Tribe of Indians for ourselves and for our people hereby agree to accept for ourselves the following described land for our Reservation:

Beginning at the source of the Chamokane Creek in Washington territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of

> November next, with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the government and abide by all laws of the same, and obey orders of the Indian Bureau and the officers acting thereunder.
>
> Signed by the Representatives of the United States Government and the Assembled Chiefs and Headmen of the Spokane Tribe"

8. The new Reservation, as described in the Agreement, was fully recognized and approved by the Secretaries of War and Interior. It became evident, however, that notwithstanding its establishment non-Indians were encroaching and settling even in the lands it enclosed. Because it included only about a thirty mile segment of the Spokane River and eight miles of the Columbia, it did not secure to the Spokanes their valued fishing sites on the upper Spokane and especially on the Columbia River to the

north including a primary fishing site at Kettle Falls. Additional negotiations continued by spokesmen for the Tribe that it be extended and enlarged to the north so as to include more of the Columbia River up to Kettle Falls thereby securing to the Spokanes a greater portion of the river for their use as an artery of commerce and as a fishery.

9. The War Department, seeking a further formalization of the Reservation, issued on September 3, 1989, the following order:

"HEADQUARTERS DEPARTMENT OF THE COLUMBIA

In the Field, Spokane Falls, Washington, September 3, 1880

Whereas in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians the following described territory, to-wit: Commencing at the mouth of Cham-a-kane Creek, thence north 8 miles in direction of said creek, thence due west to the Columbia River, thence along the

Columbia and Spokane Rivers to the point of beginning - the Indians are still expecting the Executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits: It is hereby directed that the above-described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plan necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Fort Coeur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier-General Howard.

H. H. Pierce.
First Lieutenant, Twenty-First Infantry, Acting Aid-de-Camp"

10. On January 18, 1881, the President of the United States established the Spokane Reservation as follows:

"WASHINGTON TERRITORY

Spokane Reserve.

Executive Mansion, January 18, 1881

> It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:
>
> Commencing at a point where Chemekane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.
>
> R. B. HAYES."

Thus the United States government, through President Hayes, carefully modified, clarified and enlarged the description of the Reservation to include additional land along the northern boundary and the beds of Chamokane Creek, and of the Spokane and Columbia Rivers. Such a designation, unique among executive

orders utilizing rivers as boundaries, was in partial response to the Tribe and its spokesmen that the Reservation should clearly include the waters of the rivers. From that date to this the United States government and its Congress has without deviation or change fully recognized the Spokane Reservation to be as described in the Executive Order of January 18, 1881.

11. While it was the intent of the United States that the Spokane Indians move to the newly established Reservation it became apparent that it had been established primarily an a result of pressure from the negotiations with the lower band of the Tribe lead by Chief Oliver Lot. In fact it came to be referred to as "Lot's Reservation." Few of the upper and middle bands moved to it and in fact many began to take up homesteads north of Spokane primarily in the Peone Prairie area. Others continued to reside,

farm and fish in the lands on and near the confluence of the Little Spokane River with the Spokane River and in the farming region north of the bend of Deep Creek near the Spokane River.

While the United States government had succeeded in the establishment of the Reservation, it had not succeeded in negotiating a treaty or agreement by which the title of the Indians to its aboriginal lands outside that Reservation would be ceded and extinguished. The City of Spokane Falls and all the homesteaded areas in the Big Bend, Peone and other areas were sitting on aboriginally owned unceded lands. It was, therefore, of great concern to the United States that such a cession be parleyed and take place.

12. In order to obtain the needed cession of aboriginal lands, the Congress in its Appropriation Act of May 15, 1886,

(Public No. 49, Page 17), appropriated moneys which were in part

> "To enable the Secretary of the Interior to negotiate with the upper and middle bands of Spokane Indians... for their removal to the Colville, Jocko and Coeur d'Alene Reservations with the consent of the Indians on said reservation(s) and also to enable said Secretary to negotiate with said Indians for the cession of their lands to the United States..."

The Secretary of the Interior then established a Commission headed by John V. Wright to perform the services contemplated by said Appropriations Act and to negotiate cession agreements with various Tribes including the Spokane Tribe.

13. The Wright Commission which met and parleyed with the upper and middle bands of the Tribe at Spokane Falls, Washington Territory, from March 7 to March 17, 1887, and on March 18, 1887, succeeded in securing what is denominated

the Agreement of March 18, 1887, with the Spokane Indians which agreement is set out in full in Volume 1, Kappler, Laws and Treaties, page 453, and was ratified by the Fifty-Second Congress, in 1892 (Session I, Ch. 164, 37 Stat 136, Kappler, Vol. 1, page 449).

By said Agreement, the Spokane Indians ceded to the United States "all right, title and claim which they now have, or ever had, to any and all lands lying outside of the Indian Reservations in Washington and Idaho Territories..." (Underlining Added).

The only reservation in the Tribal aboriginal lands being ceded was the Spokane Reservation established as aforesaid by Executive Order on January 18, 1881.

Thus there was a cession by the Spokanes of all of their lands outside of the Spokane Reservation and the lands on

that Reservation were carefully excluded from the cession. The Congress in ratifying the Agreement in 1892 ratified this cession of lands and the other provisions of the Agreement and in so doing also recognized as it did on other occasions the reservation of Tribal title to the Spokane Reservation.

14. On January 30, 1908, the United States government, through Special Agent Edgar A. Allen and others, held a final parley with the Spokane Indians at Fort Spokane, near Miles, Washington. The purpose of that parley was to get the consent of the Tribe to the opening of portions of the Reservation for homestead entry on what were descried as "surplus" agricultural lands. The fact that the parley took place and much of its proceedings were evidence of the conviction of the United States government that these lands were owned by the

Spokanes and consent of the Tribe was needed for them to be opened for homestead. The parley proceedings culminated in a memorandum of agreement between the Tribal chiefs and the government agencies which included the following paragraphs:

> "First. Consent is given to the opening for settlement of unallotted lands lying near Chemekane Creek and Spokane River, designated by the United States as suitable for farming purposes, the Indians to receive $5.00 per acre for such land, and
>
> "Second. To the turning over to the State sections 16 and 36 in each township of the Spokane Reservation for school purposes, the Tribe to be reimbursed for the same by the United States at the rate of $1.25 per acre.
>
> "Third. It is desired that all unallotted lands of the Reservation, not included in the two foregoing paragraphs of this memorandum be included in the United States Government Forest Reserve and cared for as such in the same manner as other such Forest Reserves."

15. By virtue of this parley and the aforesaid agreement there was enacted by

the United States Congress on May 29, 1908, (S. 6163) 35 Stat 458, "An Act to authorize the Secretary of the Interior to sell and dispose of the surplus unallotted agricultural lands of the Spokane Indian Reservation, Washington, and for other purposes." As a result of this Act and similar Acts for other Reservations, President William H. Taft on May 22, 1909, issued a Proclamation opening for homestead entry the Spokane and Flathead Reservations (that by virtue of the Flathead Act of April 23, 1905, 33 Stat L. 302), as well as the Coeur d'Alene Reservation (under its Homestead Act of 1906, 34 Stat L. 335), treating each Tribe and Reservation identically.

16. On March 3, 1905, the Congress enacted 33 Sat 1006, an act entitled "Chap. 1440 -- An Act providing for the acquirement of water rights in the Spokane River along the southern boundary of the

Spokane Indian Reservation for sites for power purposes and the beneficial use of said water, and for other purposes."

17. Further, in 1906 there was enacted in the annual Appropriations Act, 27 Stat 130, Vol. 1, 449, the following:

> "That the Secretary of the Interior be, and he is hereby, authorized in his discretion, to sell and convey by patent with such reservations as to flowage rights, dam sites, and mill sites appurtenant to water power, as he may prescribe, such tract or tracts of land of the Spokane Indian Reservation, State of Washington, lying at or near the junction of the Columbia and Spokane Rivers, not exceeding three hundred and sixty acres in extent, for townsite and terminal purposes, and that the money received therefrom shall be deposited in the Treasury of the United States to the credit of the Spokane Indians."

18. As outlined above, the Spokane Reservation, as established in 1881 by Executive Order, has been fully recognized, ratified and confirmed repeatedly by the Government of the United

States and especially by the Congress and in the other special acts and Homestead Act as outlined above.

19. Said Reservation lands, including the Spokane and Columbia Rivers and their beds bordering the Reservation, have, therefore, from time immemorial remained in the ownership of the Spokane Indians, never having been ceded by them or taken from them by any act of the United States government. These lands were carefully reserved for them by Presidential Decree in 1881 and as a part of the Reservation, the bed and banks of the rivers to the normal high water mark (before the dams were built) remain in the Spokane Indian Tribe.

20. The State of Washington claimed that it received title to said bed of the Spokane River at the time of statehood by reason of the operation of the "Equal Footing Doctrine" of the United States

Constitution. Such title, however, did not pass to the state to that section of the Spokane River by virtue of the Equal Footing Doctrine because it was held and owned by the Spokane Indian Tribe (with title then in trust for the Tribe in the United States). The United States, therefore, at the time of statehood, did not hold such title to the bed of the Spokane River on the Spokane Reservation as it did to the beds of other navigable bodies of water so as to pass it to the State of Washington on statehood. Rather that title already in the Spokane Tribe and held by the United States in trust for the Tribe was not affected by the so called Equal Footing Doctrine. Therefore, the State of Washington, has no title interest in the bed of the Spokane River within the Spokane Indian Reservation.

21. The Washington Water Power Company by virtue of an alleged

authorization by the Secretary of the Interior to build its Little Falls Dam in the southeast corner of the Reservation pursuant to the above-referenced Act of 1905, claims some interest in the bed of the river at that point and in the portion of the Spokane River under its reservoir behind Little Falls Dam. But said Act of 1905 did not authorize the grant of title to the Washington Water Power Company and no act by the Secretary of the Interior pursuant to that Act and application of the Washington Water Powert Company did or could grant any such title interest to said company.

22. The Washington Water Power Company built its Little Falls Dam at Little Falls in the southeast corner of the Reservation in 1908 and has operated that dam in the production of electric power in conjunction with its other dams on the Spokane River ever since 1908.

Except for a nominal payment to the Tribe at that time for some overflowed land on the north shore of the river it has never compensated the Tribe or paid it any damages or compensation whatsoever for its building of said dam on Tribal property and its operation of the same from 1908 to the present time. The Washington Water Power Company plans to continue its operation of said dam as its own property and without compensation to the Tribe for the indefinite future.

23. Prior to the building of said Little Dam by the Washington Water Power Company, the Spokane River bordering the Reservations was the gateway of the runs of salmon and other anadromous fish from the Pacific Ocean to the Spokane River and its tributaries. It constituted a primary fishery of the Spokane Tribe. Not only was Little Falls itself a prime fish gathering site but so was the lower part of

Chamokane Creek and the rest of the Spokane River and its tributaries up to Spokane Falls. This was the historic fishery of the Tribe on which it depended from ancient times, the fish harvest constituting its principal and most important food source. Salmon were key not only to the diet of Tribal members but to its culture and religion.

With the building of Little Falls by the Washington Water Power Company the anadromous fish runs up the Spokane River to the past Little Falls ceased and have not taken place since 1908, all to the irreparable loss and damage to the Tribe and its members.

The Washington Water Power Company could have reduced the fish loss if it had installed and operated as it initially planned a fish ladder so that the running fish could bypass the dam. Despite the fact that such a ladder was in the design

plans allegedly approved by the Secretary of the Interior, it was not installed or operated. Thus the Company did nothing to reduce or prevent the permanent and irrevocable loss of this valuable fishery.

WHEREFORE, the Spokane Tribe of Indians prays for Judgment as follows:

1. A Judgment declaring that the title of the bed of the Spokane River where it borders the south edge of the Spokane Indian Reservation up to the normal high water mark (existing before Little Falls and Grand Coulee Dams were built) is held by the United States in trust for the Spokane Indian Tribe.

2. A judgment declaring that the State of Washington does not hold title to or any title interest in or to said river bed.

3. A Judgment declaring that the Washington Water Power Company does not

hold title to or any title interest in or to the portion of the river bed occupied by its Little Falls Dam and the reservoir behind said dam within the Spokane Reservation.

4. A Judgment for damages and compensation to be paid to the Spokane Indian Tribe by the Washington Water Power Company for its wrongful and illegal building, maintenance and operation of the Little Falls Dam and power project on the Spokane Reservation since 1908 and for damages for the loss of the Tribal fishery caused by its building and maintenance of said dam. The amount of damages shall be determined at trial.

5. For such other and further relief as to the Court seems proper in the circumstances.

DATED: October 13, 1982.

DELLWO, RUDOLF & SCHROEDER, P.S.

By /s/
Robert D. Dellwo

By /s/
Gary T. Farrell

Attorneys for The Spokane Tribe of Indians

STATE OF WASHINGTON)
~~Stevens~~ :ss
County of Spokane)

JOHN W. SAMUELS, being first duly sworn on oath, deposes and says: That he is the Chairman of the Spokane Tribal Business Council, that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

/s/

Subscribed and sworn to before me this 6 day of October, 1982.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at ~~Wellpinit~~ Spokane.

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Attorneys for Defendant
The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	Civil No. C-82-753-RJM
Plaintiff,	)	
vs.	)	SUPPLEMENTAL AND SECOND
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	AMENDED ANSWER OF THE WASHINGTON WATER POWER COMPANY AND COUNTER-CLAIM FOR DECLARATORY JUDGMENT
Defendants.	)	

Answering plaintiff's complaint, defendant The Washington Water Power Company (the "Company")

(a) admits that this Court has jurisdiction to litigate the claims of the Spokane Tribe of Indians as set forth in plaintiff's complaint,

(b) admits that on March 3, 1905, the Congress enacted 33 Stat. 1006, an Act entitled "Chapter 1440 - An Act providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water and or other purposes";

(c) admits that the Company, by virtue of ~~an~~ a grant and authorization by the Secretary

of the Interior, built its Little Falls Dam in the southeast corner of the Spokane Indian Reservation commencing in 1908 pursuant to the above-referenced Act of 1908 and has operated that dam for the production of electric power in conjunction with its other dams on the Spokane River since 1910 and admits that it paid compensation to the Tribe as directed by the United States Government pursuant to the Act of 1905 and that the Company plans to continue its operation of said dam for the indefinite future without further compensation to the Tribe;

(d) denies that the building of Little Falls Dam by the Company interrupted the anadromous fish

runs up the Spokane River at its Little-Falls Dam, denies that the Company did not install and operate a fish ladder for the bypassing of said dam and denies that the Company did nothing to reduce or prevent the permanent and irrevocable loss of fishery on the Spokane River;

(e) for lack of any knowledge or information sufficient to form a present belief as to the truth of the remaining allegations of the complaint, defendant, the Company,

denies the same.

II.

FOR FURTHER ANSWER AND AS AN AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges that plaintiff's complaint fails to allege

a cause of action for which relief can be granted.

III.

FOR FURTHER ANSWER AND AS A SECOND AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

(a) that pursuant to the Act of March 3, 1905, referred to in plaintiff's complaint and pursuant to ~~permits~~ property and rights granted by the Secretary of the Interior under the provisions of said Act, the Company was granted by the United States the land and full authority to construct, operate and maintain the Little Falls Dam;

(b) that pursuant to said Act and the regulations of the Department of the Interior the-

Company paid to the United States on behalf of the Spokane Indians an amount of money then determined by the United States to be the proper compensation to the Indians for the then value of any Indian reservation properties affected by the dam;

(c) that the company did construct a fish ladder and to the best of its present knowledge and belief it was in operation so long as it was useful on the Spokane River;

(d) that in the 1930's the federal government constructed the Grand Coulee Dam which effectively blocked any further runs of anadromous fish on the Columbia River and its tributaries, including the Spokane River, above the Grand Coulee Dam.

IV.

FOR FURTHER ANSWER AND AS A THIRD AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

That the right of action set forth in the Complaint as against the Company accrued more than seventy-four (74) years prior to the commencement of this action, and said right of action is barred by a statute of litigation or laches.

FOR FURTHER ANSWER AND AS A FOURTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

On December 31, 1941, in an action in this Court, United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wa. 1941), judgment was rendered against the United States where it was determined that the right, title, and authority granted by the United States pursuant to the Act of

March 3, 1905, authorized the construction and operation of hydroelectric facilities along the Spokane River on the south boundary of the Spokane Indian Reservation. At all times relevant, therein, the United States was guardian and trustee for the Spokane Tribe of Indians. By reason of said action, plaintiff's claim against TWWPCo in this action has been previously litigated, adjudicated, and determined by plaintiff's guardian and trustee. Therefore, plaintiff is barred from relitigating this issue by reason of collateral estoppel.

VI.

FOR FURTHER ANSWER AND AS A FIFTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

Prior to this action, the United States conveyed to TWWPCo all the right, title and interest to real property

pursuant to the Act of March 3, 1905, required to construct, operate and maintain the Little Falls Development. The title granted by the United States is fee title with no reverter. Plaintiff's Complaint constitutes either a direct or collateral attack upon TWWPCo's right, title and interest, which said attack is barred by reason that the United States at all times relevant hereto was acting as guardian and trustee for the plaintiff.

VII.

FOR FURTHER ANSWER AND AS A SIXTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

Under the Act of August 13, 1946, 60 Stat. 1049, hereinafter referred to as the "Indian Claims Commission Act," the Tribe had the right to assert any claim for compensation arising out of the Act of March, 1905, including the construction,

operation and maintenance of the Little Falls development, and arising out of the acquisition of the beds of the Spokane River below the ordinary high water mark, if any, by the State of Washington under the Constitution and laws of the United States. The Tribe either made a claim under the Indian Claims Commission Act and was duly compensated with respect to any rights it may have had which were affected by the construction and operation of the Little Falls Development and the acquisition, if any, by the State of Washington of the beds of the Spokane River, or the Tribe abandoned, relinquished, waived, and lost, under the Indian Claims Commission Act, any such claim that it may have had. Any claim of the Tribe against the United States with respect to the construction, operation, and maintenance of the Little Falls Development and the ownership of the bed

of the Spokane River is barred by the Indian Claims Commission Act and the actions of the Tribe.

The Company acquired its rights, title and interests from the United States under the Act of March 3, 1905, and, to the extent required, from the State of Washington. The State of Washington acquired its interest, if any, to the beds of the Spokane River from the United States. The right, title and interests acquired by the Company and the State of Washington from the United States that relate to the construction, operation and maintenance of the Little Falls Development are protected by and benefit from the effect and the bar of the Indian Claims Commission Act from the claims now made by the Tribe.

VIII.

FOR FURTHER ANSWER AND AS A SEVENTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S

COMPLAINT, defendant, the Company, alleges:

The Spokane Tribe of Indians and the Secretary of the Interior, on behalf of the Spokane Tribe of Indians, elected to present to the Federal Power Commission ("FPC") (later, to the Federal Energy Regulatory Commission ("FERC")) the issues concerning the rights, title and interests of the Company to construct, operate and maintain the Little Falls Development on the Spokane River. The Spokane Tribe of Indians was duly represented before the FPC and FERC by Robert D. Dellwo, as its attorneys, as well as by the Secretary of the Interior through Charles E. O'Connell, an attorney with the Solicitor's Office of the Justice Department. All of the evidence deemed relevant at the time by the Spokane Tribe of Indians and the Secretary of the Interior with respect to the rights, title and interests of the

Company to construct, operate and maintain the Little Falls Development on the Spokane River was presented at evidentiary hearings held by the FERC. Various decisions were issued by the FERC after such hearings. The matter was finally adjudicated in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985), wherein the Court determined that:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development ... .

Id. at 336. Based on the foregoing, the Spokane Tribe of Indians is barred by the doctrines of collateral estoppel and res judicata from litigating, in this case,

the rights, title and interests of the Company with respect to the construction, operation, and maintenance of the Little Falls Development.

IX.

FOR COUNTERCLAIM AGAINST PLAINTIFF, defendant, The Washington Water Power Company (the "Company") alleges:

(a) On or about January 18, 1881, President Hayes created the Spokane Indian Reservation by Executive Order. The Spokane Indian Reservation was not created either by a treaty approved by the United States Senate or by Act of Congress.

(b) The United States Congress, by Act dated March 3, 1905 (33 Stat. 1006), authorized the acquisition with the consent of the Secretary of the Interior of the right to use the waters of

the Spokane River and authorized the Secretary of Interior to grant lands "necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wingwalls, flumes or other needful structures required for the development of power or for the beneficial use of said water" along the Spokane River on the south boundary of the Spokane Indian Reservation to appropriators under and pursuant to the laws of the State of Washington.

(c) In 1905 a David Wilson commenced the acquisition of water rights under Washington law and applied for a grant from the Secretary of Interior for the right to use the waters of the Spokane River

and declare the lands necessary to develop the water power under the Act of March 3, 1905. On or about January 24, 1906, Mr. Wilson filed an amended application which was subsequently approved by the Secretary of Interior on or about May 4, 1906. In September, 1906, Mr. Wilson filed an amended application which was approved by the Secretary of Interior on or about November 3, 1906.

(d) The rights of David Wilson in the Little Falls power site were conveyed to the Company, which was approved by the Secretary of Interior.

(e) Subsequently, the Company applied for additional land and water rights under the Act of 1905 which application was

approved on or about August 29, 1908.

(f) In January, 1909, a joint resurvey by the Department of the Interior and the Company of the Wilson grant was completed and the Company applied for an amended grant to conform to the joint resurvey on July 6, 1909. Such joint resurvey was approved and the amended grant to the Company was approved by the Secretary of Interior in 1910, at which time the Company had complied with all requirements of the Act of 1905 and the requirements of the Secretary of Interior.

(g) At or prior to this time the Company completed all action necessary to acquire by appropriation under Washington law

the right to use the waters of the Spokane River for hydro-electric generation purposes up to the capacity of the turbines installed in the dam, i.e., 7500 cfs.

(h) In order to secure a recordable grant, the Company applied to the Secretary of Interior for a patent or instrument in the nature of a patent and after hearing and rehearing the Secretary of Interior delivered to the Company an instrument reciting the facts relating to the grant and acknowledging that the Company had made full payment for the lands granted and had complied with all rules and regulations promulgated by the Secretary of Interior, which instrument was recorded in

Stevens County, Washington. A copy of said instrument is attached hereto and is by this reference made a part hereof as though set out in full.

(i) That as of 1910 upon the approval by the Secretary of Interior of the resurvey and additional grant, the Company received from the United States under the Act of 1905 a fee title, subject to an implied condition of reverter, to the land which, together with water rights acquired pursuant to the laws of the State of Washington and the permission of the United States as set forth in the Act of March 3, 1905, granted to the Company the right to dam the river in order to use the waters of the Spokane River for the

generation of electric power, which fee title would revert to the United States only upon the Company discontinuing the use of the land and the water for production of electric power.

WHEREFORE, having fully answered plaintiff's complaint defendant, The Washington Water Power Company, prays for relief as follows:

1. For an order dismissing, with prejudice, plaintiff's complaint against defendant, The Washington Water Power Company;

2. For an order determining that The Washington Water Power Company holds and owns, in fee, all rights, title and interests necessary for the construction, operation and maintenance of a hydro-electric power project of the nature and scope of the Company's Little Falls Development on the Spokane River;

3. In the alternative to prayer for relief No. 2, for an order determining that at least since 1910 defendant The Washington Water Power Company has had full right and authority to construct and operate its Little Falls Development and to utilize the waters of the Spokane River for hydroelectric generation of electricity up to the maximum capacity of the turbines installed in the dam, i.e., 7500 cfs; such use and occupancy being subject only to an implied condition of reverter of the fee title to the lands occupied, in the event the Company should discontinue the use of the land and water for the production of electric power as specified in the Act of March 3, 1905; and

4. For reasonable costs and attorneys' fees incurred herein along with such other and further relief as the Court may deem just and proper.

DATED this 24th day of October, 19 89.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By _____
Jerry K. Boyd
Attorneys for Defendant,
The Washington Water Power Company

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	MOTION FOR SUMMARY
v.	)	JUDGMENT OF DISMISSAL
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	OF THE CLAIMS OF THE TRIBE
Defendant.	)	BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES

COMES NOW The Washington Water Power Company (WWP), by and through its

undersigned attorneys, and moves the Court for its judgment dismissing the claims of The Spokane Tribe of Indians (Tribe) against WWP on the basis that such claims are barred by the Indian Claims Commission Act (25 U.S.C.S. §70(u) (1983), the act prohibiting the U.S. from attaching its patents (43 U.S.C. §1166), the Doctrine of Res Judicata, the Doctrine of Collateral Estoppel, the Doctrine of Estoppel by Deed, and the Doctrine of Laches). The factual bases for this Motion are contained in the Affidavit of Donald L. Olson and the documents attached to WWP's Requests for Admission submitted to the Tribe and the admissible documents attached to the Affidavit of Robert D. Dellwo, and the Affidavits of Jerry K. Boyd. A Memorandum of Authorities is filed in support of this motion.

WWP moves this Honorable Court for its order dismissing the claims of the Spokane Tribe of Indians against WWP with prejudice.

DATED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
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WSBA #2099

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	AFFIDAVIT OF JERRY K. BOYD
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendant.	)	

STATE OF WASHINGTON)
) ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath, deposes and says:

He is one of the lawyers in the above-entitled matter and states the following based on his personal knowledge.

1. He was one of the lawyers for The Washington Water Power Company before the Federal Energy Regulatory Commission and the United States Court of Appeals for the District of Columbia which decided Washington Water Power Company v. Federal Energy Regulatory Commission, 775 Fed. 2d. 305 D.C. Cir. (1985).

2. Attached is a copy of Senate Report No. 4378 for the 58th Congress, 3d Session, which is dated March 1, 1905, which was obtained from the Library of Congress.

3. Attached is a copy of House Executive Document No. 63 for the 50th Congress, 1st Session which was obtained from the Library of Congress. The date on House Executive Document No. 63 is January 9, 1888.

4. Attached is a "Report on Navigability of Spokane River, Washington, and Idaho" made by the Chief of Engineers, U. S. Army, Washington, D.C. which report is dated April 29, 1932. The copy which is attached is certified by Robert R. Spearman and was provided to this affiant by Mr. Spearman. Mr. Spearman was identified to this affiant as the spokesperson for the Corps of Engineers for the Seattle District.

5. Attached is a copy of pages from Indian Affairs, Laws and Treaties, Volume 1 Compiled to December 1, 1902. The front page of the volume and the pages were copied from a volume published by the government printing office which this affiant personally obtained from the government printing office. The Volume includes a copy of the Allotment Act of 1887 (pages 33-36), and a copy of the Act of March 2, 1899 relating to right-of-way

for railway (pages 102-104), a copy of Section 16 of the Act of 1891 which includes a copy of the Agreement with the Coeur d'Alene Indians which includes Article 3 relating to the Upper and Middle Bands of the Spokane Indians (pages 419 through 424, particularly page 420), the Act of 1892 which authorizes the funding for the movement of the Upper and Middle Bands of the Spokane Indians, Coeur d'Alene Indian Reservation and a copy of the 1887 Agreement with the Spokane Indians (pages 49, 53-54), a part of an Act which further provides for the removal of the Spokane Indians under the 1887 Agreement (page 742), a part of the Act which provides for entry of mineral lands on the Spokane Indian Reservation (page 754 and 799), copies of the Executive Orders dated April 8, 1872, April 9, 1872, and July 2, 1872, relating to the Colville Reserve established for Indians, including

the Spokane Indians (pages 915 and 916), and documents relating to the Executive Order dated January 18, 1881, establishing the Spokane Indian Reservation (pages 924-925.

6. Attached is a copy of portions of Senate Document No. 719 for the 62nd Congress, 2d Session, entitled "Indian Affairs, Laws and Treaties, Volume III, compiled to December 1, 1913, which were compiled by Charles J. Kappler. The document was obtained by this affiant from the United States Government Printing Office. The attached document includes pages from said Volume III, including a statement relating to the 1887 Agreement with the Spokane Indians (page 46), the Act of March 3, 1905, providing for the acquisition of power sites, (pages 116 and 117), a portion of the Act of 1906 relating to the Spokane Indians and providing for the sale and conveyance by

patent of flowage rights and dams on the Spokane Indian Reservation (page 245), copies of portions of a 1908 Act which provides for the surveying and allotment of the Spokane Indian Reservation (pages 313-314), an Act of May 29, 1908, authorizing the Secretary of the Interior to make allotments and to open for settlement by non indians on allotted surplus agricultural land (pages 371-373), a portion of an Act of 1909 providing for the survey, allotment and the opening of the Spokane Indian Reservation (pages 420-421), and the Proclamation opening the Spokane Indian Reservation for settlement (pages 655-657).

_____

JERRY K. BOYD

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1989.

_____

NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My Commission Expires:_____

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Attorneys for The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendant.	No. C-82-753-AAM AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 6, 1989

STATE OF WASHINGTON)
:ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

He is one of the attorneys in the above-entitled matter and was an attorney

for the Washington Water Power Company in the proceedings before the Federal Power Commission and Federal Energy Regulatory Commission which ultimately resulted in the decision in Washington Water Power Co. v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985). The below-stated facts are stated from his personal knowledge and from the pleading records retained by the offices of this affiant relating to the foregoing matter. The below-stated facts are also based upon documents provided by the attorneys for The Spokane Tribe of Indians in this matter before this Court. The Washington Water Power Company will be referred to as "WWP" and The Spokane Tribe of Indians will be referred to "Tribe."

1. On or about February 5, 1971, The Spokane Tribe of Indians served and filed a Petition to Intervene before the Federal Power Commission in Docket

No. IT-5501 and Project No. 2545 concerning the Little Falls Dam. A copy of said Petition is attached hereto and is by this reference made a part hereof as though set out in full.

2. On or about February 15, 1973, the Secretary of the Interior intervened before the Federal Power Commission in Project No. 2545 and Docket No. IT-5501 on behalf of The Spokane Tribe of Indians. A copy of the Petition to Intervene filed on behalf of the Secretary of Interior is attached hereto and is by this reference made a part hereof as though set out in full.

3. On and before October 4, 1977, WWP contended that the Federal Power Commission and the Federal Energy Regulatory Commission (FERC) did not have jurisdiction to consider the matters raised by the Tribe. Arguments were had before an Administrative Law Judge. Both

the Secretary of Interior on behalf of The Spokane Tribe of Indians and The Spokane Tribe of Indians, by and through its attorney, Robert D. Dellwo, argued that the FERC had jurisdiction to determine WWP's rights with respect to the Little Falls Hydroelectric Development. Ultimately, the Administrative Law Judge determined that the FERC did have such jurisdiction and the matter proceeded.

4. The staff of the FERC, the Secretary of the Interior, the Spokane Tribe of Indians, and WWP presented all evidence to the FERC which the respective parties deemed relevant to the determination of WWP's rights, title and interest in the Little Falls Hydroelectric Development. Hearings were held and the parties filed legal briefs and made all arguments the parties deemed relevant. An Administrative Law Judge and the FERC issued various orders making findings and

conclusions relating to WWP's rights with respect to the Little Falls Hydroelectric Development. All of the relevant and admissible documents relating to WWP's rights, title, and interest which have been submitted to this Court were submitted to and considered by the FERC. Those documents included all of the governmental documents identified and submitted to this Court. Evidentiary hearings were held by the FERC in Spokane, Washington, and in Washington, D.C. at which time the Secretary of the Interior on behalf of the Spokane Tribe of Indians and the Spokane Tribe of Indians through its attorney, Robert Dellwo, had an opportunity to present whatever testimony and offer whatever documents they deemed relevant and material to the determination of the rights, title and interest of WWP in the Little Falls Hydroelectric Development. In addition, the staff of the

FERC presented evidence concerning the issue of WWP's rights to Little Falls. The issue before the FERC was whether or not WWP had acquired all of the right, title and interest prior to June 10, 1920 (the effective date of the Federal Water Power Act) necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. The Spokane Tribe of Indians, the Secretary of the Interior, and the staff of the FERC were all attempting to establish that WWP did not have all of the rights, title and interest for the construction, operation, and maintenance of the Little Falls Hydroelectric Development.

After the hearings were closed, and after the parties had submitted all of the testimony and documentary evidence which they deemed relevant, the Spokane Tribe of Indians requested an opportunity to reopen the hearings to present additional

documentary evidence. WWP opposed such request by the Tribe. The hearing officer reopened the hearings and allowed additional evidence to be presented by Tribe.

Briefs on legal issues were filed by all parties. All parties had an opportunity to make all of the legal arguments based on record before the FERC. Some of the findings and conclusions made by the FERC were adverse to WWP.

5. The Spokane Tribe of Indians, through its attorney, Robert D. Dellwo, the Secretary of the Interior through its solicitor, and the staff of the FERC had a full and fair hearing before the FERC.

6. WWP filed a Petition for Judicial Review with the United States Court of Appeals for the D.C. Circuit. All of the documents filed with the FERC were submitted to the United States Court of Appeals. The United States Court of

Appeals considered the entire record before the FERC and determined, as a matter of law, that WWP holds all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development. Washington Water Power Co. v. FERC, 775 F.2d 305, 336 (D.C. Cir. 1985).

7. A copy of WWP's Petition for Judicial Review was served upon all parties including the FERC, the attorney representing the Secretary of the Interior, and the attorney representing the Spokane Tribe of Indians. The Spokane Tribe of Indians intervened as a party in Washington Water Power Co. v. FERC, 775 Fed.2d 305 (D.C. Cir. 1985). The FERC was represented by an attorney. The position taken by the FERC's attorney and the attorney for the Spokane Tribe of Indians was substantially the same. Both parties filed briefs before the United States

Court of Appeals, D.C. Circuit, and both parties made oral argument before the United States Court of Appeals. As is shown by the decision of the United States Court of Appeals in Washington Water Power Co. v. FERC, the issue before the court was whether or not WWP had acquired, prior to June 10, 1920, all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Development. If WWP had not acquired such rights, title and interest prior to 1920, then, under the Federal Power Act, WWP may have been required to obtain a license to continue to operate and maintain the Little Falls Hydroelectric Development.

8. At all times relevant to the proceedings before the FERC, the United States Court of Appeals and the United States Court of Appeals, D.C. Circuit, the Spokane Tribe was vigorously represented

by Robert D. Dellwo and his law firm. The Spokane Tribe of Indians and their representatives had a full and fair hearing and an opportunity to present whatever evidence the Tribe and their attorneys deemed relevant and material. The Tribe had an opportunity to make whatever legal arguments they deemed relevant and material.

9. The Spokane Tribe of Indians filed a claim against the United States for compensation in Indian Claims Commission No. 331. A copy of the Petition is attached hereto and is by this reference made a part hereof as though set out in full. This copy was obtained from the attorneys for the Tribe in this matter before this Court.

10. This affiant has been representing the Washington Water Power Company with respect to this matter since approximately 1972. This affiant has been

unable to find any living Washington Water Power Company who has any personal knowledge concerning the construction and operation of the Little Falls Hydroelectric Development prior to 1920.

11. The record that was presented to the United States Court of Appeals in Washington Water Power Co. v. FERC, included a transcript of all of the hearings and testimony presented to the FERC and included all of the documentary evidence presented to the FERC and included most of the documentary filing (pleadings, etc.) which were submitted to the FERC. The documentary evidence in the record included more than 150 documents which were admitted in the hearings and which were offered by various parties, including the Tribe.

JERRY K. BOYD

SIGNED AND SWORN TO before me this 5th day of October, 1989, by JERRY K. BOYD.

_____

Notary Public in and for the State of Washington, residing at Spokane.
My Appointment Expires: _____

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Attorneys for The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 19, 1989
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

STATE OF WASHINGTON)
) ss:
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

He is one of the attorneys for The Washington Water Power Company in this

matter and represents The Washington Water Power Company in The Washington Water Power Company v. Spokane Tribe of Indians, Cause No. C-85-705-RJM, before the United States District Court, Eastern District of Washington. He was also one of the attorneys for The Washington Water Power Company in The Washington Water Power Company v. FERC, 775 2d. 305 (1985). The below stated facts are based upon his personal knowledge and information.

1. The Tribe has claimed that it has the power to impose a tax on The Washington Water Power Company (WWP) with respect to the operation of the Little Falls Hydroelectric Development. The subject matter of such tax and the authority of the Tribe to impose such tax is at issue in said Cause No. C-85-705-RJB.

2. Exhibit No. 77 before the Federal Energy Regulatory Commission (FERC) was a

certified copy of the patent issued by the United States Secretary of the Interior, Mr. Hubert Work, in 1924. A true and correct and complete copy of such patent as recorded in the auditor's office for Stevens County, State of Washington, is attached hereto.

_____

JERRY K. BOYD

SUBSCRIBED AND SWORN to before me this 19th day of October, 1989.

_____

NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My commission expires:_____

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Attorneys for The Defendant, The
Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	No. C-82-753-AAM AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 25, 1989

STATE OF WASHINGTON)
:ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

1. The below-stated facts are based upon his personal knowledge and informa-

tion and are based upon the documents in his files arising from the proceedings which lead to the Court's opinion in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985).

2. Attached hereto and by this reference made a part hereof is a copy of defendant The Washington Water Power Company's First Requests for Admission to Plaintiff. Said Requests for Admission to plaintiff were served on September 12, 1989. Neither the Spokane Tribe of Indians nor the Tribe's attorneys have served any response whatever to said Requests for Admission. The facts stated in said Requests are by this reference made a part hereof as though set out in full.

3. This affiant and Robert D. Dellwo represented The Washington Water Power Company and the Spokane Tribe of Indians, respectively, in proceedings

before the Federal Energy Regulatory Commission (FERC) and the United States Court of Appeals for the District of Columbia.

4. On March 22, 1978, the presiding Administrative Law Judge of the FERC issued an Order to all parties in the proceedings with respect to Project No. 2545, which parties included the FERC staff, the Secretary of the Interior, the Spokane Tribe of Indians, and The Washington Water Power Company (WWP). A copy of the Order of the presiding Administrative Law Judge dated March 22, 1978 is by this reference made a part hereof as though set out in full.

5. By Order of March 22, 1978, the presiding Administrative Law Judge ordered all parties to the FERC proceeding to file memoranda with respect to the issue of whether or not FERC had jurisdiction to determine the rights of WWP with respect

to the Little Falls project. Attached hereto and incorporated by this reference hereof is a copy of the memoranda filed by the Secretary of the Interior, WWP, the Spokane Tribe of Indians, and the FERC staff. Said copies are true and correct copies of the briefs or memoranda submitted by the parties.

6. Following the submission of briefs and memoranda by the parties to the FERC proceeding, the presiding Administrative Law Judge issued an Order dated June 1, 1978, by which the Administrative Law Judge ordered further proceedings and concluded that the FERC had authority and jurisdiction to determine the rights of WWP with respect to the Little Falls Hydroelectric Development. The Administrative Law Judge based his conclusion on Section 23A and Section 23B of the Federal Power Act (16 U.S.C. §§ 816 and 817). The Administrative

Law Judge then ordered further proceedings, which included several hearings where all parties fully participated, including WWP and the Tribe, and where more than 150 exhibits were admitted. All of the exhibits identified and admitted in the FERC proceeding have been identified as exhibits by the parties herein.

7. On April 1, 1980, the presiding Administrative Law Judge issued his initial decision determining commission jurisdiction over the Little Falls Hydroelectric Development and also certified a record accompanying the initial decision. Copies of the initial decision of the presiding Administrative Law Judge and the record are attached hereto and are by this reference made a part hereof as though set out in full.

8. On March 26, 1979, the presiding Administrative Law Judge issued an Order

setting hearing dates for Spokane, Washington, and Washington, D.C. A copy of said Order is attached hereto and is by this reference made a part hereof as though set out in full.

9. After hearings were held in Spokane, Washington, and in Washington, D.C., the parties then submitted briefs. A copy of the Brief of the Spokane Tribe filed with the FERC dated September 17, 1979, the initial Brief submitted by WWP to FERC for Project No. 2545 served on September 4, 1979, the initial Brief dated September 24, 1979 filed by the Commission staff counsel with the FERC in Project No. 2545, and the initial Brief filed by the Secretary of the Interior dated September 24, 1979, filed with the FERC in docket number 2545 are attached hereto and are by this reference made a part hereof as though set out in full. As the Briefs show, the same issues raised in this

proceeding before this Court were presented to the Administrative Law Judge in the FERC proceeding as it relates to the rights, title and interest of WWP with respect to the Little Falls Hydroelectric Development.

10. After the issuance of the initial decision on April 1, 1980 by the presiding Administrative Law Judge, WWP filed its Brief on Exceptions to the Initial Decision. A copy of WWP's Brief on Exceptions is attached hereto and is by this reference made a part hereof as though set out in full.

11. The Tribe, the Secretary of the Interior, and the FERC staff all filed briefs opposing WWP's exceptions and supporting the ALF's initial decision.

12. On April 8, 1981, the FERC issued its Opinion No. 117, whereby the FERC concluded that WWP did not have all of the rights, title and interests

necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. A copy of FERC Opinion No. 117 is attached hereto and is by this reference made a part hereof as though set out in full.

13. On or about October 4, 1983, the FERC issued its Opinion No. 117-A and denied WWP's Motion for Rehearing. It is the FERC Opinion No. 117 and Opinion No. 117-A from which WWP sought judicial review by the United States Court of Appeals in the District of Columbia.

14. All or substantially all of the transcript of hearings and the exhibits which were submitted to the FERC were also submitted to the United States Court of Appeals for the District of Columbia.

15. The Spokane Tribe of Indians fully participated in all aspects of the proceedings before the FERC and fully participated in the proceedings before the

United States Court of Appeals for the District of Columbia prior to the issuance by the United States Court of Appeals of its Opinion in WWP v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

16. The issue of the rights, title and interest obtained by WWP under the Act of March 3, 1905 and under Washington law were fully adjudicated before the FERC and were fully presented and fully argued before the United States Court of Appeals for the District of Columbia in the matter described above. All parties, including the Tribe, had a full opportunity to present whatever evidence the Tribe deemed relevant to the issue of the rights, title and interest of WWP with respect to the Little Falls Hydroelectric Development. In the matter before the FERC, it was WWP's burden of proof to show that WWP had all of the rights, title and interest necessary for the construction, operation

and maintenance of the Little Falls Hydroelectric Development and that WWP had acquired such rights prior to June 10, 1920. That was the issue that was presented to the FERC and that was the issue the FERC and the United States Court of Appeals for the District of Columbia adjudicated.

17. The proceedings before the FERC and before the United States Court of Appeals for the District of Columbia required this affiant and other attorneys in this affiant's law firm to spend hundreds of hours in preparing for such hearings and in preparing briefs and in making arguments before the FERC and before the United States Court of Appeals. This legal work was performed at great cost to WWP. If the same issues must be tried and presented to this United States District Court, all of the efforts made before the FERC and made before the United

States Court of Appeals will have been wasted since such efforts and the outcome of such litigation, which was initiated by the actions and the intervention of the Spokane Tribe of Indians before the Federal Power Commission and the FERC, and was pursued and prosecuted to a final conclusion by the FERC and the Tribe. To the personal knowledge of this affiant, the Spokane Tribe of Indians has had a full opportunity to litigate the issues with respect to the rights, title and interests acquired by WWP and held by WWP with respect to the Little Falls Hydroelectric Development before the FERC and the United States Court of Appeals for the District of Columbia.

18. Attached hereto and by this reference made a part hereof are the Briefs filed by the Secretary of the Interior and the Spokane Tribe of Indians with the United States Court of Appeals

for the District of Columbia, Docket No. 83-2051, which is the case that ultimately resulted in the opinion in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985).

19. Attached hereto and by this reference made a part hereof is a true and correct copy of the decision issued by the United States Court of Appeals in Docket No. 83-2051 in The Washington Water Power Company v. Federal Energy Regulatory Commission, which decision is published at 775 F.2d 305. Attached to the opinion is a copy of the orders of the United States Court of Appeals for the District of Columbia wherein the Court denied the Petition for Rehearing filed by the FERC and the Tribe and rejected the suggestion for rehearing en banc. The copies of such decision and orders attached hereto are true and correct copies of the copies

received by the undersigned attorney from the Court.

_____
JERRY K. BOYD

SUBSCRIBED AND SWORN TO before me this 26th day of October, 1989, by Jerry K. Boyd.

_____
Notary Public in and for the State of Washington, residing at Spokane.
My commission expires:_____

No. 91-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON,
Defendant,
and
WASHINGTON WATER POWER COMPANY,
Defendant/Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NO. CV-82-00753 AAM

BRIEF OF APPELLEE WASHINGTON WATER POWER COMPANY

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Milton G. Rowland
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Attorneys for Defendant/Appellee
Washington Water Power Co.

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* * *

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463-466 (E.D.Wash. 1941) 172a, 216a
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Davis & Cox v. Summa Corp.,
751 F.2d 1507 (9th Cir. 1985) 207a

Menominee Tribe of Indians v. United States,
179 Ct.Cl. 496,
388 F.2d 998 (1967) 247a

Michael-Regan Co., Inc. v. Lindell,
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Six Nations Confederacy v. Andrus,
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Temoak Band of Western Shoshone Indians, Nevada v. United States,
593 F.2d 994 (Ct.Cl. 1979) . . 214a

United States v. Lower Sioux Indian Community in Minnesota,
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__ P.2d __ (Jan. 22, 1991) . . 221a

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U.S. Constitution, art. III 224a

U.S. Constitution, art. IV, § 3 . . 227a

Statutes and Regulations:

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16 U.S.C. §§ 816 and 817 . . . . . 183a

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28 U.S.C. § 2106 . . . . . 223a

43 U.S.C. § 1166 . . . . . 216a

Other Authorities:

Treatises:

1 Kappler, Indian Affairs, Laws and Treaties, pp. 924-925 . . . . 191a, 192a

Restatement of Restitution, § 173, Comment *b* 222a

Restatement (Second) of Trusts, § 298, Comment *i* 222a

Administrative Decisions:

Washington Water Power Company, Federal Energy Regulatory Commission Project No. 2545:

-- Initial Decision, 11 FERC ¶63,001 169a

-- Opinion No. 117, 15 FERC ¶61,039 175a

-- Opinion No. 117-A, 25 FERC ¶61,001 180a

Other:

Act of Congress of March 2, 1899 . 212a

Act of Congress of March 3, 1905 passim

Dawes Act of 1887 . . . . . 252a

House Executive Document No. 63, 50th Cong., 1st Sess. 193a

17 Ind.Cl.Comm. 584 . . . . . 163a

I. STATEMENT OF ISSUES ON APPEAL.

1. Is Appellant collaterally estopped from relitigating WWP's right, title and interest in the Little Falls Dam site after presenting such questions to the District of Columbia Circuit Court of Appeals for decision, and receiving an adverse decision from that Court?

2. Is Appellant precluded from seeking damages from WWP on the theory that the Congress and Secretary of the Interior permitted WWP to obtain rights, title and interest in the Little Falls Dam site without providing "sufficient" consideration to Appellant, by the Indian Claims Commission Act, 25 U.S.C. § 70, and litigation thereunder?

3. Is Appellant barred from collaterally attacking a patent issued to Appellee in 1924?

4. Is Appellant precluded by laches, or the bona fide purchaser

doctrine, from seeking damages against WWP sixty-plus years after WWP purchased the subject property rights and erected a dam (and other structures) thereon?

5.(a) Should this Court decide Appellant's motion for summary judgment even though that motion was not argued to the trial court?

(b) Alternatively, do material fact questions preclude summary judgment regarding Appellant's claim to lands granted to WWP by the Secretary of the Interior prior to 1925, pursuant to a 1905 Act of Congress?

II. STATEMENT OF FACTS.

The facts related to the Little Falls Dam site, including the manner in which Washington Water Power Co. came into title of the relevant lands, are discussed in great detail in Washington Water Power v. Federal Energy Regulatory Comm., 775 F.2d 305 (D.C.Cir. 1985) (hereafter WWP v.

FERC), and will not be repeated here in such detail. The following entities will have the abbreviations shown: The Washington Water Power Co. (WWP); Spokane Tribe of Indians (Tribe); Federal Power Commission (FPC); Federal Energy Regulatory Commission (FERC); Secretary of the Interior or Department of the Interior (Interior).

A. PROCEDURAL HISTORY.

Although the Tribe commenced its action in the United States District Court for the Eastern District of Washington in 1982, the procedural history of the claim of the Tribe against WWP dates back to 1971, when the Tribe filed its Petition for Intervention before the FPC in connection with Project No. 2545.[1] A copy of the Tribe's Petition for Intervention before the FPC is found in Supp.Excerpts

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[1] Project No. 2545 is the project licensed by the FPC in 1972.

5-8.[2] By comparing the Petition for Intervention and the Complaint in this matter, it is clear that the Tribe was making the same claims against WWP in the FPC proceeding as they made in the action filed in the district court below.

Significantly, the Tribe asserted that it had a right to intervene, inasmuch as it "may be bound by the Commission's action in the proceeding and that said acts will detrimentally affect petitioner's rights herein." (Supp.Excerpts 6-7) The Tribe asserted that it was damaged by WWP's actions with respect to the Little Falls Development at issue, and that it had never been adequately compensated by WWP. (Supp.Excerpts 7) The Tribe thus asserted that the FPC had jurisdiction over the

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[2] For convenience, the Supplemental Excerpts of Record submitted by Appellee are cited herein as "Supp.Excerpts," with reference to the page number therein.

Little Falls hydroelectric sites, because the authorities on which WWP relied had never granted WWP the rights WWP claimed; instead, according to the Tribe, the subject property was tribal land. (Supp.Excerpts 5-8, 191-196, 274-75, 354-55, 361-405)[3]

In the FPC proceeding, WWP objected to the intervention by the Tribe and later, before FERC, WWP raised the issue of the jurisdiction of the FERC to determine WWP's property rights. The Tribe opposed WWP's objection to FERC

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[3] Note that at Supp.Excerpts 405, the Tribe argued that it had been inadequately compensated for WWP's activities at the project sites in forceful terms: "The writer can only retch at the foregoing terminology 'Grand Total' as compensation for what was one of the most valuable hydro power sites in the northwest." Id, p. 52 of Brief of Spokane Indian Tribe to Federal Energy Regulatory Commission, Project No. 2545, September 17, 1979.

jurisdiction,[4] and argued that FERC should retain jurisdiction and require WWP to obtain a license. The Presiding Administrative Law Judge (ALJ) ruled against WWP and in favor of the position taken by the Tribe, and the FERC retained jurisdiction. (Supp.Excerpts 312)

Interior also intervened in the FPC-FERC action. (Supp.Excerpts 177) The petition filed by Interior attaches a letter, incorporated by reference into the petition. (Supp.Excerpts 180, 183-86) Interior indicated that it "supports the position of the intervening Spokane Indian Tribes . . . for the reasons hereinafter stated." (Supp.Excerpts 184) Among the reasons thereinafter stated was Interior's concern for "the protection and utilization of the Coeur d'Alene and Spokane Indian Reservations, including the

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[4] See Supp.Excerpts at 460, 462-465.

payment of annual charges to the Tribes for the use of their lands." (Supp.Excerpts 186) Thus, two parties to the FERC proceeding advanced the Tribe's position in that action and herein.

In the FERC proceeding, hearings were held and an Initial Decision was issued by the Presiding ALJ on April 1, 1980. 11 FERC ¶63,001, at pp. 65,001, et seq. A copy of the Initial Decision is set forth in Supp.Excerpts at page 460.

As the ALJ noted, the Tribe argued that WWP did not have title to the lands purportedly within the Spokane Indian Reservation and that the site was acquired without just compensation or due process of law.[5] The ALJ stated that "the

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[5] In the Initial Decision, the Presiding ALJ stated the following:

> Counsel for the Spokane Tribe argues on brief that certain actions of the Secretary during the period of 1905 through 1924 were

appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in these proceedings." However, the ALJ went on to

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> invalid and questions WWPC's title to the Indian reservation lands, where the Little Falls development is situated. It is further suggested that the site was acquired without just compensation or due process of law. The resolution of these questions is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding. These actions will, however, be considered on their face in determining whether WWPC received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.

11 FERC at 65,002.

state that he would consider all of the evidence relating to the actions of the Government "on their face" to determine whether or not WWP had "received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act."[6]

A review of the ALJ's Initial Decision shows that the ALJ considered and determined every issue relating to WWP's rights, title and interest in the land. Indeed, after discussing many of the facts and much of the evidence that was before him, he stated that "the evidence in this record must establish the nature of authorization, if any, which WWPC received from the Secretary prior to the enactment

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[6] Id.

of the Federal Water Power Act."[7] (Emphasis added.) 11 FERC at 65,004.

The ALJ then went on to discuss, in detail, much of the other evidence that was before him, evidence which was submitted by all parties, including Mr. Robert D. Dellwo on behalf of the Spokane Indian Tribe.[8] After further analysis of the evidence before him, the ALJ stated that WWP had the burden of showing "that it possesses a permit or valid right of way granted prior to June 10, 1920, as prescribed by Section 23(b) of the Federal Power Act...." 11 FERC at 65,006. The ALJ went on to discuss Big Bend Transit Co. v. United States, 42 F.Supp. 459 (E.D.Wash. 1941); see 11 FERC at 65,007-65,008. The

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[7] WWP suggests that the word "authorization" should be read to mean "title."

[8] Mr. Dellwo is the same Robert D. Dellwo that is representing the Spokane Indian Tribe before this Court.

ALJ undertook substantial efforts to distinguish WWP's rights and title from those discussed in Big Bend. Id.

After reviewing all of the evidence[9], the ALJ concluded that WWP "does not have a valid pre-1920 permit"[10]. In substance, the ALJ concluded that WWP does not have the necessary right, title and interest to construct, operate and maintain the Little Falls Development, and therefore was not exempt under the Federal Water Power Act of 1920 or the Federal Power Act of 1935, as amended.

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[9] The evidence that was presented or could have been presented in the FERC proceeding was the same evidence that would have been presented to the district court below.

[10] 11 FERC at 65,008. Construction of the Act of March 3, 1905, by Interior, which was charged with administering the statute contemporaneously with its enactment, is entitled to substantial deference. Blum v. Bacon, 457 U.S. 132, 141 (1982); and WWP v. FERC, supra at 322.

There are other notable statements made in the ALJ's Initial Decision. For example, the ALJ discussed correspondence between WWP and Interior. The ALJ stated:

> In a letter to the Assistance Commissioner of Indian Affairs, dated May 5, 1909, WWPC suggested the possibility of acquiring additional Spokane Indian reservation lands under the Act of 1905, for the purpose of developing another power plant, and inquired about compensation for such lands as well as the character of the grant which the Secretary would issue. On May 8, 1909, the Secretary responded that compensation would be determined according to the Act of March 2, 1899, and that the title granted under the Act of 1905 would be a full and permanent title, revocable only for non-use.[11]

The ALJ also decided the navigability of the Spokane River[12]. WWP filed briefs on exceptions and appealed the ALJ's

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[11] 11 FERC at 65,003 (emphasis added).

[12] 11 FERC at 65,008-65,010.

Initial Decision to the FERC. The first decision concerning WWP's rights, title and interest at the Little Falls development is set forth in 15 FERC ¶61,039, ¶¶61,064 et seq. In FERC Opinion No. 117 (id.), the FERC noted that WWP had acquired land and water rights on the Spokane River and noted that in 1924, "WWPC obtained a patent for the lands it acquired." The FERC then stated the following:

> In order to resolve the ultimate question of whether WWPC is required to license the continued operation and maintenance of its Little Falls water power development, it is necessary to consider, first, the nature and extent of the pre-FWPA authorization that will substitute for a current license under the FPA to continue to operate and maintain a hydro-electric development. And it is necessary to consider, second, the nature of such authorization

held by WWPC under the Act of March 3, 1905.[13]

From the foregoing, it is obvious that the FERC considered and determined the nature of the rights, title and interest of WWP which were acquired pursuant to the Act of March 3, 1905, in order to determine whether or not the Little Falls Development was exempt from licensing under the Federal Power Act.

The FERC noted that the Act of March 3, 1905, authorized Interior to grant land to a water appropriator for the erection of dams and hydro-electric facilities.[14] The FERC further noted that Congressman Jones, who sponsored the bill, stated that the Act of March 3, 1905, "authorizes the acquirement of title to

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[13] 15 FERC at 61,065. This Opinion is set forth in full at Supp.Excerpts 460.

[14] 15 FERC at 61,069.

this land...."[15] In its Opinion No. 117, the FERC stated the following:

> There is considerable controversy in this proceeding with respect to the nature of the interests in the lands of the Spokane Indian Reservation granted under the Act of March 3, 1905. While the Spokane Indian Tribe has asserted a constitutional challenge to WWPC's title under that Act, the presiding judge has said that WWPC's title is not in issue. WWPC contends in its brief on exceptions (1) that it acquired "all federal right, title and interest to the water power and property of the Little Falls development", (1) that the judge decided that it has no title, (2) that the judge decided that it has no title, (3) that the Commission cannot determine its title, and (4) that the government is estopped from challenging its title.
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> We agree with the presiding judge that it is not necessary to resolve the constitutional challenge to WWPC's title under the Act of March 3, 1905, to determine whether the Little Falls development is required to

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[15] Id.

be licensed under the FPA. If the lands of the Spokane Indian Reservation were granted in fee simple under the Act of March 3, 1905, they would have ceased being part of that reservation and would no longer have been "reservations" within the purview of Section 3(2) of the FPA, because the United States would not have retained any property interest in them. Accordingly, the continued operation and maintenance of the Little Falls development on those lands would not today be prohibited (without authorization) by reason of that development's utilizing "reservations" of the United States. If, on the other hand, those lands were granted in less than fee simple, as we find, *infra*, (of if the grants are void, which issue is not reached), the United States continues to have a reserved interest in them, they continue to be "reservations" within the purview of Section 3(2) and the continued operation and maintenance of the Little Falls development is prohibited (without authorization) by reason of its utilizing "reservations" of the United States.

> While ordinarily the Commission does not determine issues associated with title to lands, the Commission can and will do so to the extent necessary to administer the FPA. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960), wherein the Commission determined whether Indian lands were "reservations" within the purview of Section 3(2) for the purpose of determining whether it would be required to make a finding pursuant to Section 4(e) that the license in question would "not interfere or be inconsistent with the purpose for which such reservation was crated or acquired."[16]

As can be seen from the foregoing, the FERC did consider and determine WWP's rights, title and interest to the lands it acquired and owned with respect to the Little Falls Development. This is also apparent from a review of Opinion No. 117, which is set forth in its entirety in the Supp.Excerpts at page 460. The FERC

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[16] 15 FERC at 61,069-61,070 (emphasis added).

considered all of the evidence that was before the ALJ that had been presented by all parties, including the Tribe and WWP concerning WWP's title to land in order to decide whether WWP could continue to maintain and operate the Little Falls Development without a license issued by the FERC. 15 FERC at 61,076.

WWP then filed an application for rehearing, which was denied. Ultimately, the FERC issued Opinion No. 117-A, in which the FERC discussed, once again, the nature of the rights, title and interest of WWP at the Little Falls hydro-electric development and again concluded that WWP did not have sufficient rights, title and interest to allow it to continue to operate and maintain the Little Falls hydro-electric development without obtaining a license under the Federal Power Act. 25 FERC ¶61,002, ¶¶61,001, et seq., Supp.Excerpts 477.

WWP sought judicial review of the FERC's adjudication of WWP's rights, title and interest with respect to the Little Falls hydro-electric development. The Tribe again vigorously contested WWP's position that its prior right, title and interest to the Little Falls site deprived the FERC of jurisdiction over the site.[17] Finally, on judicial review, the United States Court of Appeals for the District

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[17] This Court may take judicial notice of filings in other cases in which a litigant before this Court was a party. Securities and Exchange Comm'n v. Securities Northwest, Inc., 573 F.2d 622 (9th Cir. 1978). To that end, the cover page and Statement of Issues for the Tribe's brief to the D.C. Circuit is attached hereto as Appendix A, although it is not otherwise part of the record on this appeal. If such is improper, WWP would withdraw the submission. However, because the similarity between the issues advanced by the Tribe before the D.C. Circuit Court of Appeals and those advanced before this court is so striking, and the Tribe appears to disclaim that similarity, it is felt that such should be offered in the interests of justice.

of Columbia Circuit issued its opinion on October 18, 1985, in WWP v. FERC, 775 F.2d 305 (D.C.Cir. 1985).

The D.C. Circuit Court of Appeals considered all of the evidence presented by all parties, including the Tribe and its attorneys and WWP and its attorneys[18] relating to WWP's rights, title and interests in the Little Falls hydro-electric development. The Court concluded that WWP "now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls power development" and is therefore exempt from the application of the Federal Power Act

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[18] The Tribe was represented by Robert D. Dellwo, the same attorney who represents the Tribe before this Court and the court below, and WWP was represented by Jerry K. Boyd, the same attorney who represents WWP before this Court and the court below.

by Sections 23(a) and (b), 16 U.S.C. §§ 816 and 817. Id. at 336.

As shown in the affidavit of Jerry K. Boyd, WWP was required to present evidence concerning its rights, title and interest to the Little Falls Development and defend those rights, title and interest against attacks made by the Tribe and two agencies of the United States--the FERC staff and Interior on behalf of the Tribe. (Supp.Excerpts 204-209) The efforts required by WWP to establish its rights, title and interests and to defend those rights, title and interests were of great magnitude and extended from 1971 to 1985, and required the expenditure of many tens of thousands of dollars in legal fees and costs through all of the proceedings before the FERC and the D.C. Circuit Court of Appeals.

Prior to the FPC/FERC litigation, the Tribe made claim against the United States

pursuant to 25 U.S.C. § 70(a). (Supp.Excerpts 191) That statute provided that all tribal claims against the United States pre-dating 1946 must be brought before 1952. Claims related to inadequate compensation for tribal lands are expressly included in the statute, 25 U.S.C. § 70(a)(5), and claim was made under that section. (Supp.Excerpts 191-192) All claims were settled therein. See 17 Ind.Cl.Comm. 584.

B. COURT PROCEEDINGS.

While the issue concerning WWP's rights, title and interests at the Little Falls hydro-electric development was being litigated before the FERC, the Tribe commenced an action in the United States District Court for the Eastern District of Washington in 1982 (Docket No. CV-82-00753-AAM). The action was commenced between the issuance of FERC

Opinion No. 117 and FERC Opinion No. 117-A.

In 1984, WWP moved for summary judgment of dismissal against the Tribe, which summary judgment was based upon much of the evidence that had been presented in the FERC proceeding. (CR 18, Motion dated December 21, 1984.) The Tribe requested a stay of proceedings before the court, arguing that it was attempting to obtain either funding from or the intervention of Interior. (Supp.Excerpts 537-538)

The opinion of the United States Court of Appeals for the District of Columbia Circuit was issued in October, 1985, while the stay of the district court action was still in place. Subsequently, the district court stay was lifted and the matter proceeded, with a trial being scheduled by the court. (CR 65, Order dated May 15, 1989.) WWP moved to amend its answer and counterclaims to include a

defense and counterclaim based upon collateral estoppel, which was, in turn, based upon the decision of the United States Court of Appeals. (CR 67, Motion dated September 15, 1989.) Such motion was granted, WWP filed its amended answer and counterclaim, and the matter was finally heard on November 9, 1989. (Excerpts 71)

A transcript of the proceeding before the district court shows that the only matter that was given consideration by the court was WWP's motion for summary judgment of dismissal based upon collateral estoppel. (Excerpts 71-96) The court ruled from the bench that it was dismissing the Tribe's claims against WWP based on collateral estoppel and that the court would be issuing a written decision. The court ultimately did issue a written decision which was filed with the clerk of the Court on February 8, 1990. (Excerpts 65) In that decision, the court ruled in

favor of WWP and dismissed WWP from the lawsuit. Subsequently, the Tribe filed a motion for reconsideration, which was denied by order of the court entered on April 8, 1990. (Excerpts 97)

After the entry of the order of the court denying the Tribe's motion for reconsideration, the Tribe filed an amended complaint to state a claim against the United States of America. The Tribe served a copy of the amended complaint on WWP's attorneys. (Affidavit of Jerry K. Boyd dated September 20, 1990, Supp.Excerpts 530) After discussions between the attorneys for the Tribe and WWP, a stipulation and proposed order was signed on behalf of WWP and the Tribe. The original of the stipulation and proposed order was then sent to the court for signature and entry or filing. A copy of the stipulation and proposed order was attached to the Affidavit of Jerry K.

Boyd, CR 180, filed September 21 1990. The Tribe did not serve any other papers on WWP after the service of the amended complaint.

On or about September 14, 1990, the Tribe filed and presented, *ex parte*, various motions and orders to the district court. Those orders included, *inter alia*, a judgment quieting title in the Tribe to some of the very land claimed and owned by WWP at the Little Falls hydro-electric development. (See CR 177, Judgment dated September 14, 1990) Four days after the *ex parte* presentation of motions, orders and judgment to the court, the Tribe provided a copy of such orders to WWP's undersigned attorneys. (Supp.Excerpts 530-532)

The undersigned attorneys immediately moved to amend the judgment so that the judgment would conform with the determinations of the D.C. Circuit Court of Appeals and the prior determinations of

the United States District Court for the Eastern District of Washington. CR 178, Motion dated September 21, 1990. The district court denied WWP's motions and entered its order on October 12, 1990. (Supp.Excerpts 534) WWP then filed its notice of appeal with respect to the order denying WWP's motion to amend judgment, which notice of appeal was filed on November 9, 1990, and which is the subject matter of a separate appeal to this Court.[19]

The statement of the Tribe on page 13 of its brief concerning the stipulation of the parties and judgment entered quieting the Tribe's title to the river and the riverbed did not include any stipulation or agreement from or on behalf of WWP. The

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[19] Apparently due to clerical error, the clerk's office never took action on WWP's appeal, and there is no docket number at present. WWP's Notice of Appeal is attached hereto as Appendix B.

judgment was entered *ex parte* by the Tribe without any notice to WWP; that the order WWP has vehemently objected to said order, and understands that the order is not applicable to WWP and, as to WWP, is a nullity and is void. (See Supp.Excerpts 535) The *ex parte* issuance of the judgment quieting title in the Tribe is the subject matter of a separate appeal taken by WWP and will not be further discussed in this proceeding.[20]

C. FACTS RELATED TO TRIBE'S MOTION.

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[20] The undersigned attorneys were shocked and surprised by the *ex parte* actions taken on behalf of the Tribe and believe that such actions violate any concept of fair play, substantial justice or due process and believe that such actions were done *ex parte* by the Tribe as part of a concerted effort to gain an advantage in other proceedings. See Supp.Excerpts 530. In WWP v. Tribe, E.D.Wash. Cause No. CV-82-00753-AAM, WWP is challenging an attempt by the Tribe to impose a tax on WWP's Little Falls Development. The ownership of WWP's land may become significant in that litigation.

In discussing such matters, the undisputed facts should be set forth and are as follows: In 1880, an Army general commanded that his aide-de-camp issue an order setting aside certain territory for the use of the Tribe. (1 Kappler, Indian Affairs, Laws and Treaties, pp. 924-925, Supp.Excerpts 120) Reference is made in the military order to "a promise made in August, 1877, by E.C. Watkins."

This may be an erroneous citation to a purported agreement which is referred to in paragraph VII of the Complaint on pp. 3 and 4. It should be noted that in the Tribe's Complaint at p. 3 at about L. 24, according to the Complaint, the Tribe agreed to go upon an area of land which had the Spokane River as a boundary "with the view of establishing our permanent homes thereon and engaging in agricultural pursuits." (Emphasis added.)

In 1881, President R.B. Hayes issued an Executive Order setting aside and reserving "for the use and occupancy of the Spokane Indians, a tract of land which also had, as its boundary, the Spokane River." (1 Kappler, Laws and Treaties, supra, p. 925, and paragraph 10 of the Complaint.) There is no showing in the record that Congress ever authorized the establishment of the Spokane Indian Reservation.

Indeed, it is clear that in 1872, the President first established an Indian reservation for the Spokane Indians and other Indians which included the later Spokane Indian Reservation. In 1872, the President revoked such Executive Order and established an Indian reservation by another 1872 Executive Order for the Spokane Indians in an area which includes what is now the Colville Indian Reservation. (1 Kappler, Laws and

Treaties, pp. 915-916, supra. Furthermore, it is clear that Spokane Indians were supposed to be removed to the Coeur d'Alene Indian Reservation in Idaho, the Jocko (Flathead) Indian Reservation in Montana, or the Colville Indian Reservation. (House Executive Document No. 63, 50th Cong., 1st Sess., pp. 4-11, 30-34, 45, 51-56, 58-60, Supp.Excerpts 52, and 1 Kappler, Laws and Treaties, supra, pp. 449, 453-454.)

III. ARGUMENT

A. THE TRIBE IS COLLATERALLY ESTOPPED FROM RE-LITIGATING OWNERSHIP INTERESTS AT THE LITTLE FALLS SITE.

It is axiomatic that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction... cannot be disputed in a subsequent suit between the same parties or their privies." Montana v. United States, 440 U.S. 147, 153 (1979), quoting Southern Pacific R.Co. v.

United States, 168 U.S. 1 (1897). Thus, questions put in issue and directly determined by the District of Columbia Circuit in WWP v. FERC, 775 F.2d 305 (1985), cannot be re-litigated between the Tribe and WWP. See also City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) (once federal license is granted following hearing in which State intervened, State cannot file second suit challenging licensee's authority to hold federal license).

The D.C. Circuit case decided all facts essential to the Tribe's claim of ownership to the Little Falls site, including the following:

(1) The rights derived from the Act of Congress of March 3, 1905, by WWP and by WWP's predecessor in interest, David Wilson;

(2) Wilson/WWP compliance with said 1905 Act, which includes compensation as expressly provided for by Congress in Section 3 of

that Act (see also Big Bend Transit, 42 F.Supp. at 464-66);

(3) Effect of compliance with the 1905 Act;

(4) Patent rights held by WWP;

(5) Navigability of the Spokane River at Little Falls;

(6) The effect of the licenses issued to WWP and Mr. Wilson by the Secretary of the Interior, and the patent issued to WWP in 1924.

The Tribe's present posture is all the more surprising since it, and not WWP, put the question of tribal rights and remedies in issue in the FERC proceeding. See Supp.Excerpts 226-228, wherein the Tribe prays for the following relief before the FPC:

...

3. That the Commission assume jurisdiction as a judicial forum to litigate and decide the rights of the Spokane Tribe with regard to the past, present and future operation of Little Falls Dam and that it award the Tribe damages and compensation for the

initial taking of the site the dam occupies and its past and future operation as a power dam.

4. That the Commission by its orders provide for the eventual extinguishment of all the rights the Washington Water Power Company may have to Little Falls Dam site and the reversion of those rights to the Spokane Tribe of Indians.

(Supp.Excerpts 227) In Appendix A, the Court will note that the Tribe presented the same issues to the District of Columbia Circuit Court of Appeals.

Of course, collateral estoppel even applies to a final decision of an administrative agency. University of Tennessee v. Elliott, 478 U.S. 788 (1986). Here, however, we have more than a mere administrative determination of right, title and interest in the Little Falls site. We have a judicial determination on appeal from the administrative decision,

as in City of Tacoma v. Taxpayers of Tacoma, supra.

In City of Tacoma, the State of Washington asserted that a FPC license could not be granted to the City over the objections of the City's creator, the State. On appeal from the Commission's determination that such a license was proper, this Court affirmed. State of Washington v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953). During pendency of the appeal therein, the State opposed a bond issue by the City, on grounds already decided by this Court. See 357 U.S. at 331-332. The Washington Supreme Court held in favor of the State, but was reversed by a unanimous Court:

> At the threshold of this controversy petitioner, the City, asserts that... this question has been finally decided by the decision of the Court of Appeals (207 F.2d 391) and this Court's denial of certiorari (347 U.S. 936); and that respondents' cross-

> complaints ... in the Washington courts have been only impermissible collateral attacks upon the final judgment of the Court of Appeals. If this assertion is correct, the judgment of the Supreme Court of Washington now before us would necessarily have to be reversed, for obviously that court, like this one, may not, in such a case, re-examine and decide a question which has been finally determined in a court of competent jurisdiction in earlier litigation between the parties.

City of Tacoma, 375 U.S. at 334 (emphasis supplied). Holding that this Court's decision was a "final" determination by a court of competent jurisdiction, the United States Supreme Court held that the later proceedings "were impermissible collateral attacks upon and *de novo* litigation between the same parties of issues determined by the final judgment of the Court of Appeals." 357 U.S. at 341.

The present case is indistinguishable in principle from City of Tacoma. The

nature and quality of WWP's rights and title to the Little Falls dam site were foundation issues essential to the WWP v. FERC decision that WWP was not subject to FERC jurisdiction in operating that facility. Before the WWP v. FERC court could decide whether WWP's Little Falls Development was exempt under the Federal Power Act, the court was required to determine WWP's property rights--and the court did so. Accordingly, under City of Tacoma, the Tribe is not permitted to re-litigate WWP's right, title and interest herein.

Similarly, in University of Tennessee v. Elliott, supra, the Supreme Court held that the factual findings of a state administrative agency were entitled to preclusive effect in a subsequent action brought under 42 U.S.C. § 1983. Thus, a party is required to appeal an adverse decision regardless of the forum, if that

party wants to avoid the preclusive effect of the adverse decision. That is what WWP did when it appealed the adverse FERC decision to the District of Columbia Circuit Court of Appeals. The Tribe may not collaterally attack the WWP v. FERC decision in a subsequent action.[21]

The Tribe could have petitioned for a writ of certiorari to review the adverse decision it received in WWP v. FERC. It did not. The Tribe may not collaterally attack WWP v. FERC in this case.

B. ALL OF THE ELEMENTS TO APPLICATION OF COLLATERAL ESTOPPEL, AS SET FORTH BY THE TRIBE, HAVE BEEN MET.

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[21] Note that in the University of Tennessee litigation, as here, the federal court proceedings were pending at the time the "other" decision was rendered. 478 U.S. at 790-791. Nonetheless, the determination in the "other" action was entitled to preclusive effect. That is also true of the City of Tacoma case, in which the bond validation (second) suit was filed while the appeal to this Court (first suit) was still pending.

WWP urges that this Court is bound by the principles advanced in Montana v. United States and City of Tacoma v. Taxpayers of Tacoma, supra, as addressed above. However, the Tribe has advanced the proposition that collateral estoppel can only be applied if a set of four elements is met. The Tribe states these elements as follows:

> Collateral estoppel may only be invoked if (1) the issue previously adjudicated is identical to that presently raised; (2) the issue was actually decided in the prior case; (3) prior determination of that issue was necessary to the entry of judgment in the prior action; (4) the party against whom the doctrine is to be applied was afforded a full and fair opportunity to litigate the issue in the prior proceeding.

Brief of Appellant, at 20. Interestingly, the Tribe does not cite a single Ninth Circuit case for the elements to cc1lateral estoppel as the Tribe advances them.

The elements advanced by the Tribe will not necessarily bind this Court, as is evident from Mr. Justice Rehnquist's concurrence in Montana v. United States, 440 U.S. 147, 164 (1979). However, because the Tribe advances these elements and because they are met in any event, WWP will address them in turn.

1. Identity of issues.

The Tribe glosses over this point, ignoring its own pleadings before the FERC, the arguments it made to the Court in WWP v. FERC, and the D.C. Circuit's opinion. The Tribe asserts that the questions posed to that Court include only matters of rights-of-way and exemptions. Brief of Appellant, at 24. The Tribe thereupon argues that these matters are "clearly not identical" to its claims to ownership of WWP's land and damages from the Little Falls site and WWP's operation of Little Falls for 80 years.

In order to reach the question of FERC jurisdiction, the D.C. Circuit was required to decide the nature of the rights WWP purchased pursuant to the Act of Congress of March 3, 1905, and the approvals and patents issued by Interior. See Appendix A to this Brief. These factual matters are identical to those the Tribe wishes to re-litigate here.

As Montana v. United States makes clear, the "identity of issues" point permits the Court to pierce the pleadings and determine the questions and positions actually advanced by the parties. In Montana, unlike the case at bench, the distinguishable issues regarding state taxation of federal contractors were presented in the second suit, since different years were at issue than in the former proceedings. Notwithstanding the distinction, the decision in the first case was given preclusive effect.

WWP submits that, as in Montana, the factual matters presented to the District of Columbia Circuit had an "identity" to those presented herein. Accordingly, issue preclusion should be applied to bar the Tribe's claims.

2. Actual decision in D.C. Circuit case.

In WWP v. FERC, supra, the Court actually considered all relevant evidence, decided all issues surrounding the Act of Congress of 1905, compensation as exclusively provided in Section 3 thereof, and all land titles and water rights obtained by Wilson and WWP which are now owned by WWP. See 775 F.2d at 336 (WWP "now owns the rights, title and interest necessary for the construction, operation, and maintenance of the Little Falls power development"). Those are the precise factual issues presented here.

The Tribe argues that the fact that, at times, the D.C. Circuit used the term "right of way" to describe the interest received by Wilson and WWP indicates that the Court did not determine the precise nature of the interest received by WWP. The Tribe states, without citation, that "[e]ach member of the [D.C. Circuit] court assumed without deciding that WWP acquired some unspecified interest in the subject lands and water." Brief of Appellant, at 26.

This argument ignores the fact that the D.C. Circuit Court had to determine what interest, if any, WWP acquired over 80 years ago at Little Falls to determine whether operation of the hydroelectric facility there was subject to FERC jurisdiction. If no patent was issued, if WWP had not paid the requisite compensation, if WWP had not perfected its interest in accordance with applicable

law, if the Spokane River was navigable (and thus Corps of Engineers approval might have been required)[22], the D.C. Circuit decision would have been different.

That Court actually decided that WWP acquired land and water rights at the Little Falls dam site and that WWP acquired all of the property rights from the Congress and Interior required to construct, operate and maintain the Little Falls Development. Indeed, there is strong evidence that the Court decided WWP has at least a limited fee with implied reverter for non-use. WWP v. FERC at 325.

It is clear that the WWP v. FERC court construed the 1905 Act and the facts

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[22] The State of Washington now recognizes that the Spokane River is not navigable at that point. CR 171. However, due to the Tribe's assertions before the Commission and the D.C. Circuit, WWP was forced to prove that point therein. See 775 F.2d at 317.

applicable to Little Falls Development and concluded that WWP and Interior had congressional authority to grant land to WWP and did grant and convey land to WWP. Id. at 309, 310, 312, 313, 319, 320, 323, 324, 325, 326, and 336. It is also clear that the WWP v. FERC court concluded that the rights under the 1905 Act are "permanent" and constitute "title" to the land. Id. at 315, fn. 7, and 316.

Even if the WWP v. FERC opinion was not clear, the necessary inference from the judgment and the pleadings clearly show WWP title to the Little Falls property was decided by the WWP v. FERC court and are entitled to preclusive effect. Davis & Cox v. Summa Corp., 571 F.2d 1507, 1518 (9th Cir. 1985).

3. Issues necessarily decided.

As demonstrated above, the effect of the instruments and Acts of Congress of 1905-1924 were foundational matters before

the D.C. Circuit, necessary to the determination of FERC jurisdiction over the Little Falls site and facilities.

4. Full and fair opportunity for hearing.

The Tribe chose, over WWP's objections, to use the FPC/FERC as a forum for determining its interests in and right to damages for WWP's use of the Little Falls site. The Tribe submitted lengthy briefs to the Commission. (Supp.Excerpts 273, 345) The Tribe does not contend that its arguments were not read or considered.

The Tribe does argue that the absence of sustained discussions of the more arcane aspects of Indian law in the decisions of the FPC/FERC proceedings indicates that its position was not fully and fairly determined. Brief of Appellant, at 30. This argument does not bear scrutiny.

Any claim of the Tribe to a compensable interest in lands must arise from some treaty or Act of Congress. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). By examining and deciding the relevant Acts of Congress and Interior between 1905 and 1923, the District of Columbia Circuit Court of Appeals did, in fact, determine that WWP has and owns the rights, title and interests at issue herein. 775 F.2d at 336. The corollary (that the Tribe does not have those rights, and was paid for them pursuant to congressional directive) does not require profound exploration of the nuances of Indian law. Obviously, no two persons can own the same property.

To summarize: the Tribe chose to put its rights in issue before the FPC/FERC and the D.C. Circuit Court of Appeals. It vigorously advanced its position, and it lost. It is no more unfair to bind the

Tribe to the decision it aided than to bind any other litigant to a prior adverse decision on the merits.

C. THE TRIBE'S DAMAGES CLAIMS ARE BARRED BY *RES JUDICATA*, AND THE DOCTRINE AGAINST COLLATERAL ATTACK.

The Tribe's damages claims herein are really, in substance, an argument that Congress and Interior should not have permitted Wilson, and through Wilson, WWP, to gain title to reservation lands at the price set by Congress. When reduced to its essential basis, the Tribe's claim is this: Congress should not have given our lands away so cheaply, and since WWP ultimately benefitted from Congress's acts, WWP should pay us more, now.

The Tribe's claims are not well taken. Several grounds exist to support dismissal of these claims.[23]

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[23] This Court has held that it would affirm the trial court on any basis fairly presented by the record. A&A Concrete v.

1. Exclusive compensation method.

First, in the Act of Congress of March 3, 1905, Congress provided an exclusive method of compensation for the Little Falls site lands. Section 3 of the 1905 Act provides:

> **Sec. 3.** That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section three of the Act of March second, eighteen hundred and ninety-nine, entitled "An Act to provide for the acquiring of rights-of-way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

There is no question that such payment was in fact made. The Tribe has not asserted to the contrary. Rather, in briefs filed with the FPC, the Tribe asserted that the amount mandated by Congress was inadequate. See Supp.Excerpts 405.

White Mountain Apache Tribe, 781 F.2d 1411, 1415 (9th Cir. 1986).

WWP submits that Section 3 of the Act of Congress of March 3, 1905, by reference to the Act of Congress of March 2, 1899, provided the exclusive means by which Congress intended the Tribe to be compensated for the Little Falls dam site. See Blum v. Stenson, 465 U.S. 886 (1984) (where the resolution of a question of federal law turns on a statute, the Court looks first to the statutory language, and to congressional intent if the language is unclear).

The Act of Congress of March 3, 1905, clearly sets forth the intent of Congress that any person who would use the Spokane River at Little Falls for hydroelectric purposes could obtain the necessary property rights by paying a defined level of compensation. That being unquestionably done in this case, the Tribe has no recourse against the person acting in

accordance with congressional will. The recourse is against Congress, if any.

2. *Res judicata* effect of Indian Claims Commission Act.

All claims related to takings of Indian land for inadequate consideration before 1946 were covered by the Indian Claims Commission Act, 25 U.S.C. § 70(a), et seq. All claims that relate to the taking of Indian land under federal law were directed to that Commission, 25 U.S.C. § 70(a)(5), and the Indian Claims Commission Act provided the "exclusive system for determination of claims" covered thereby. Six Nations Confederacy v. Andrus, 610 F.2d 996, 998 (D.C.Cir. 1979) (tribe members not free to pursue other avenues to make claims); United States v. Lower Sioux Indian Community in Minnesota, 519 F.2d 1378 (Ct.Cl. 1975) (claim stated under 25 U.S.C. 70(a) for sale of reservation

lands by United States); Temoak Band of Western Shoshone Indians, Nevada v. United States, 593 F.2d 994 (Ct.Cl. 1979) (tribe could not assert title to aboriginal lands after suit to recover compensation for them).

Under 25 U.S.C. § 70(a), all claims for lands taken under federal law are lost, if not made in a timely fashion, absent fraud. See Lower Sioux Indian Community, supra, (permitting amendment to relate back, thus avoiding forfe ture of untimely claims). The Tribe did make such a claim, Supp.Excerpts 191, including claims for the taking of tribal lands without just compensation. That claim was settled for over $6 million, and under 25 U.S.C. § 70(u), congressional appropriations of funds made the settlement final. See Six Nations Confederacy, supra.

Under applicable principles of *res judicata* and language of the Indian Claims Commission Act itself, all claims the Tribe might have brought against the United States for taking tribal lands are barred, whether they were actually made or not. 25 U.S.C. § 70(k). The Tribe's claim here is, in essence, a claim that the United States sold off tribal lands without requiring the purchaser, Wilson and WWP, to pay adequate consideration. This Court should apply *res judicata* to bar the instant damages claims.[24] See Nevada v. United States, 103 S.Ct. 2906 (1983).

3. Collateral attack on patent.

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[24] It is beyond dispute that the actions of WWP were authorized by the Act of March 3, 1905. WWP v. FERC, supra. Indeed, one claim of the Tribe is for destruction of alleged fisheries 80 years ago. Such destruction, if it occurred, arose out of conduct authorized by Congress and Interior.

A "patent" is "the customary instrument used by government to transfer legal title." Shaw v. Kellogg, 170 U.S. 312, 342 (1898). The government conveyed a "patent" to WWP when it approved the applications and maps submitted, as noted in Big Bend Transit Co. v. United States., 42 F.Supp. 459, 467 (E.D.Wash. 1941). A patent was issued finally in 1924. (Supp.Excerpts 438-445)

The United States is barred from challenging a patent after six years following the date of transfer, absent fraud or other recognized equitable ground. 43 U.S.C. § 1166. Since any compensable interest in lands claimed by the Tribe must arise from an Act of Congress, Sioux Tribe of Indians v. United States, supra, 316 U.S. at 326, it follows that the Tribe is subject to the same limitations in challenging a patent as is the United States.

No fraud or recognized equitable ground for challenging the title transferred to WWP appears in the present record. Certainly it is undisputed that WWP has been using the site for over 80 years, and there is no question of the Tribe's knowledge of WWP's activities. Accordingly, WWP submits that the Tribe cannot attack the patent issued, or its equivalent, 80 years later.

4. Laches bars the Tribe's damages claims.

No person may permit generation after generation to be born, grow old and die, before bringing claims against another. The Tribe herein makes claims for damages for, among other things, alleged fisheries that disappeared 80 years ago or more, and which no one alive remembers.

Laches bars a claim where unexcused and unreasonable delay has caused prejudice. Boone v. Mechanical

Specialties, Inc., 609 F.2d 956 (9th Cir. 1979); Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155 (5th Cir. 1982). In this case, the Tribe has permitted sufficient time to pass that anyone with knowledge of actual damage allegedly caused by the WWP facility, if any, has long since passed away. For example, any damage to fisheries depends upon witnesses (for both sides) who are no longer living. Thus, WWP is precluded from use of any live witnesses or other contemporary evidence tending to question the existence or value of the alleged fisheries.

This case is a perfect example of the kind of case for which the laches defense was developed. WWP should not be forced to try damages issues through hearsay testimony, or through historical documents that may or may not have considered all relevant evidence bearing on the subject, and which are not subject to cross-

examination. This Court should hold that the Tribe's damages claims are barred by laches.

5. WWP is in the position of a bona fide purchaser.

Over 85 years ago, WWP purchased rights from David Wilson, applied for and received various governmental approvals, and expended millions of dollars on the Little Falls site. Even in an adverse decision, the FERC Administrative Law Judge recognized the good faith with which WWP has asserted title and interest, derived from Congress, for over 80 years. (Supp.Excerpts 312, 342)

The Tribe's position in this lawsuit would lead to the conclusion that no one can rely upon land titles, no matter what federal governmental acts intervened and created a private interest in such land. Certainly if the Tribe is permitted to make a claim that Congress did not grant

David Wilson or WWP what everyone understood it did, or that the compensation scheme set by Congress was inadequate, there is no reason why any tribe anywhere cannot assert claims against the present owners of land to which a tribe may have some colorable, if ancient and disputed, claim. Conceivably, if the Tribe prevails here, can the Tribe sue to recover money or land from the non-Indians who bought land under the homestead laws pursuant to Act of Congress?

WWP believes that it was and is entitled to rely upon the rights bestowed by Congress and Interior upon WWP's predecessor, which WWP never had any reason to question. Indeed, even if the latter portion of WWP's long and rightful occupancy of the Little Falls site, both courts to confront the issue have

concluded that WWP owns the lands. Big Bend Transit, supra; WWP v. FERC, supra.

WWP submits that when it paid David Wilson for the rights stemming from the Act of Congress of March 3, 1905, and when it perfected the interests therein, without any reason to question the actions of Congress and Interior, WWP was in the position of a bona fide purchaser for value. A bona fide purchaser for value is one who pays a valuable consideration property without knowledge of the claims of another. Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984).[25] The adequacy of the consideration paid is immaterial, so long as it is not so inadequate as to suggest fraud.

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[25] The Washington Court of Appeals has recently decided that a contract purchaser of real property, who records without notice of adverse claims, is entitled to Bona Fide Purchaser (BFP) status. Tomlinson v. Clarke, 60 Wn.App. 344, __ P.2d __ (Jan. 22, 1991).

Restatement of Restitution, § 173, Comment *b*; Restatement (Second) of Trusts, § 298, Comment *i*.

As the long holder of property rights assigned by a transferee from Congress and Interior, WWP is entitled to rely on its ownership interest. WWP knows of no authority suggesting that it is required to doubt or mistrust congressional actions.

D. THIS COURT HAS APPELLATE JURISDICTION ONLY OVER THE TRIBE'S MOTION WHICH WAS DISMISSED, AND SHOULD NOT DECIDE ISSUES NEVER DECIDED BELOW.

After the district court granted WWP's motion for summary judgment, the Tribe's motion for summary judgment became moot. For that reason, and not for any reasons related to the merits, the district court denied the Tribe's motion. (CR 138, Order entered 2/8/90.)

The Tribe requests this Court to review the Order of February 8, 1990, not

for mootness, but on the merits. That would be the first time a court has ruled on the merits of the Tribe's motion, which was vigorously contested, though never decided, below. (CR 103, Memorandum filed 10/20/89; Excerpts 71-96.)

WWP believes that, while the Tribe is entitled to seek review of the determination that its motion was moot, it is not appropriate to seek review of an issue never decided on the merits below. This is a question of this Court's appellate jurisdiction.

This Court's jurisdiction is appellate, not original. See 28 U.S.C. § 2106 (this Court may modify, affirm, etc. "any... order of a court lawfully brought before it for review"); 28 U.S.C. § 1291 (appellate court has "jurisdiction of appeals from all final decisions of district courts"). The "final decision" from which the Tribe has taken the present

appeal[26] is the Order certified as final by the trial court. (CR 155, order dated 6/5/90.)

WWP believes that, once the district court granted WWP's motion, the trial court had no subject matter jurisdiction to determine the Tribe's motion. U.S. Constitution, art. III. That determination is subject to review herein, but the Tribe's motion itself, which has never been decided, is not subject to "review."

If this Court reverses the district court's order granting summary judgment to

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[26] The procedural history of this Appeal is confusing, at minimum, and WWP has strong doubts as to the timeliness of this appeal and the Tribe's Statement of jurisdictional basis therefor. While the tribe claims that this is a 28 U.S.C. § 1291 appeal, Brief of Appellant, at p. 1, the Tribe also moved for certification of "no just reason for delay," indicating a 28 U.S.C. § 1292 appeal. (CR 147, motion dated 4/16/90.) This motion was denied. CR 155, Order dated 6/5/90. The notice of appeal was filed many months later. (CR 188, notice filed 10/12/90.)

WWP, then, if the Tribe presents its motion again on remand, the district court can rule on the merits. Until the district court rules on the merits, however, there is nothing for this Court to review. Accordingly, the Tribe's argument on this issue is not a proper subject for this Court to review at this time.

As the United States Supreme Court held in Singleton v. Wulff, 428 U.S. 106 (1976), an appellate court should not resolve issues on which the trial court has passed, except in exceptional circumstances, as where the matter is undisputed or indisputable. This is not one of those circumstances.

E. THE TRIBE'S MOTION LACKED MERIT BELOW, AND SHOULD BE DENIED HERE.

The Tribe did not file a statement of facts or memorandum in support of its motion for summary judgment. It is thus difficult to determine what issues the

Tribe sought to present to the trial court. It appears that the Tribe is raising three bases for such motion here. This Court should not address them. See, e.g., Michael-Regan Co., Inc. v. Lindell, 527 F.2d 653 (9th Cir. 1975).

Under Fed.R.Civ.P. 56, the Tribe may only obtain a summary judgment if there are no genuine issues of material fact. However, there are genuine issues of material fact with respect tc whether the Tribe ever had title to the property at issue and whether such property is within an Indian reservation and whether there has been extinguishment of Indian title with respect to the Little Falls hydro-electric development.

For example, the Exhibits attached to the first Robert D. Dellwo Affidavit, CR 76, particularly Exhibit 22 at p. 1 and Exhibit 39 at p. 2, the special Indian allotting agent who was charged with the

duty of determining which lands could be allotted to individual Indians (Mr. Clair Hunt), concluded that the land which had been previously granted to David Wilson and WWP was not available for allotment. Therefore, according to Mr. Clair Hunt's letters, the boundary of the allotments adjoining the lands granted to WWP and Wilson was, in fact, the boundary of such Wilson and WWP lands. Such allotments do not include WWP's lands.

In addition to the foregoing, there is and was no evidence that Congress ever specifically authorized and established the Spokane Indian Reservation, prior to 1905. In Sioux Tribe of Indians v. United States, 316 U.S 317, 326 (1942), the Court held that Congress has the exclusive authority to dispose of public lands under Article IV, § 3 of the United States Constitution. Absent a treaty which established the reservation or an Act of

Congress which established the reservation, the Tribe never had any compensatory interest in the lands of the Executive Order Reservation. Id., 316 U.S. at 326.

Therefore, it should be considered that when Congress authorized the construction of dams and the disposition or disposal of the land along the Spokane River under the Act of March 3, 1905, Congress must have intended to extinguish any Indian title or claim with respect to that property. See Sioux Tribe of Indians v. U.S., supra.

In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977), the Court made clear that Congress has the authority to abrogate any Indian claim to property. It is also clear from the Rosebud case that when the actions of the Federal Government are being construed to determine whether or not an extinguishment has occurred, the

Court is not limited to looking at the language of any act of Congress, but is rather required to look at all of the facts and circumstances to determine the intent of Congress and the Government. Id. at 594-598.

Indeed, the court may consider how the government has treated the property at issue and whether or not the state has exercised authority over the property at issue. Id. at 604. Under the holding of the Court in Rosebud, it is clearly inappropriate for the court to enter a summary judgment on the issue of extinguishment without having the full record before it, particularly, as is shown here, where it is undisputed that Congress never actually authorized the establishment of the Spokane Indian Reservation and where Congress authorized the sale of land to WWP and Wilson.

The cases cited by the Tribe in the Brief of Appellant do not support its contentions herein. Those cases all involved Indian reservations which were established by treaty or pursuant to Act of Congress.

None of the cases cited by the Tribe involve a case where an Indian reservation was established by an Executive Order and where there had not been any specific authority from Congress for the issuance of such Executive Order. As pointed out previously, the claim of the Tribe herein involves the respective rights between the Tribe and WWP and the State of Washington, vis-a-vis the Spokane River at the site where the Little Falls hydro-electric development is constructed, and involves a claim for damages against WWP in connection with the construction of the Little Falls hydro-electric development.

(See the Tribe's Complaint, CR 1, Supp.Excerpts 447)

However, in its Memorandum filed on September 26, 1989, at p. 4, L. 22, the Tribe is arguing that it brought this action "to finally resolve ongoing jurisdictional and ownership disputes, and to quiet once and for all the Tribe's continuing title to the bed and north bank of the Spokane River where it forms the south boundary of the Reservation, and to establish the continuing right of its members to access and use the river and reservoir for fishing, aesthetic and recreation purposes, and for any other use consistent with the purposes for which the Reservation was formed." CR 73.

On p. 8 of its Memorandum, commencing at L. 7, the Tribe states that "the questions of 'extinguishment' of the Tribe's title and 'diminishment' of the Reservation boundaries are therefore the

substantive and pivotal issues to be decided by this Court." CR 73. As between WWP and the Tribe, the "extinguishment" need not be decided in this case. WWP claims that as between WWP and the Tribe, the ownership issues have previously been decided in WWP v. FERC, 775 F.2d 305, 336 (D.C. Cir. 1985).

A determination with respect to "extinguishment," "diminishment," or "jurisdiction" is not necessary in this case. However, the determination of the Court in this case could possibly have an impact on those matters, and the law with respect to such matters will be discussed below.

On March 3, 1905, Congress enacted the statute which specifically authorized the acquisition of lands and the construction of water power developments on the Spokane River along the southern boundary of the Spokane Indian

Reservation. It has ultimately been determined by Interior, and the United States Court of Appeals for the District of Columbia that when Interior approved the applications made by David Wilson and WWP, the effect of such actions by Interior was to grant all of the right, title and interest necessary for the construction, operation and maintenance of the Little Falls hydro-electric development. WWP v. FERC, supra.

It should also be noted that there is no Congressional delegation of authority or no act of Congress which provides for the grant or conveyance of the bed of the Spokane River to the Spokane Indians. As will be shown later, depending on the assumptions, this may be of some significance.

None of the cases cited by the Tribe with respect to "extinguishment" or "diminishment" involve an Executive Order

reservation which was never authorized by Congress prior to the sale of land under federal law, nor do such cases involve an act of Congress which specifically authorizes the grant of lands for the purpose of constructing water power projects. The following is a brief discussion of each of the cases cited by the Tribe in its briefing below, and to this Court.

Shoshone Tribe v. United States, 299 U.S. 476 (1937). This case involves the Wind River Reservation which was established by treaty. The case involved a suit in the Court of Claims for alleged breach of treaty rights and involved the jurisdiction of a special act of Congress authorizing such a claim. Id. at 484-485. The treaty specifically stated that the Reservation was "set apart for the absolute and undisturbed use and occupancy of the Shoshone Indians . . . and such

other friendly tribes or individual Indians as from time to time they [Shoshone Indians] may be willing, with the consent of the United States, to admit amongst them." (Emphasis added.) Id. at 485-486. The Court took special note of the:

> solemn pledge of faith by the United States that no persons, except a few specially enumerated, and government agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved.

Id. at 486.

After the treaty reservation was established for the Shoshone Indians, the Government located a large group of Northern Arapahoe Indians on the Wind River Reservation. The Shoshone Indians protested. However, the Government persisted in its actions and gave the Northern Arapahoe Indians equal rights on

the Reservation. Id. at 486-490. Under such circumstances, the Court held that the United States Government has title to the land and that the United States, effectively, granted rights in the Wind River Reservation to the Northern Arapahoe Indians. The Court then held that such action by the United States Government constituted a "taking" and that the Shoshone Indians were entitled to compensation. Id. at 496.

The Shoshone Tribe v. U.S. case does support the concept that where the Government has taken property in a treaty reservation, then such taking is valid and the Tribe is entitled to compensation. The Shoshone Tribe v. U.S. case is distinguishable from the Spokane Tribe case in that the reservation at issue was a treaty reservation and not an Executive Order reservation. However, it is clear that where Congress has authorized a

taking, such taking is lawful. The only remedy for the Tribe was a claim before the Court of Claims which was specifically authorized by Congress.

Solem v. Bartlett, 465 U.S. 463 (1984). The Solem case involved a question of the criminal jurisdiction of a state court in connection with a rape committed by an Indian on land in an Indian reservation. The question was whether or not the place where the rape occurred was "Indian country" as defined in 18 U.S.C. § 1151.

Generally, the case has no relevancy to the issues before this Court. However, the case did discuss whether or not the Indian reservation in that case had been diminished. The Indian reservation had been established by Act of Congress. Id. at 465. The reservation was opened for settlement under a 1908 statute. Id. at 467. There was substantial discussion of

the fact that the policy of the United States Government with respect to Indians was a policy of assimilation and that reservations were expected to be things of the past. Id. at 467-468.

The court also discussed the fact that whether or not an Indian reservation has been diminished does not depend solely on whether or not there is explicit language in the statute. Rather, the court should look at all of the circumstances and the contemporaneous understandings. Where an area has lost its Indian character and where the area involved has been acknowledged as not being part of the reservation and has not been treated as part of the reservation, such diminishment may be de facto, if not de jure. Id. at 471. In the Solem case, there was evidence that there was a strong tribal presence, there were few homesteads perfected in the area, the population consisted of a high

percentage of tribal members. Under that circumstance, the court held that, for the purposes of 18 U.S.C. § 1151, the area where the rape occurred was considered to be "Indian country."

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In Rosebud, the court was considering a claim of the Indian tribe for declaratory judgment. The reservation at issue was created by treaty and by act of Congress. Id. at 585, 589. Several Congressional acts authorized the disposal of all unallotted land. In Rosebud, the power of Congress to abrogate treaty rights was specifically acknowledged. Id. at 594. The court also noted that there is no particular statement that must be made by Congress to accomplish the disestablishment of an Indian reservation. Id. at 597.

Indeed, the court noted that any Congressional act enacted after the

decision of the court in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), must be construed in light of the holding of the Lone Wolf court. Id. at 598. The court seemed to give particular emphasis to the fact that neither Congress nor the Department of Indian Affairs ever sought to exercise its authority over the area at issue or to challenge the state's exercise of authority over that area. Id. at 604.

The court also noted that if the Government took allotments from the Indians, other allotments would be granted and that there was a strong indication of a continuing interest in disestablishing the reservation in the affected area. Id. at 613.

It should also be noted that in Lone Wolf, the court stated, with respect to property claimed by Indians, Congress has absolute power. Lone Wolf, at 565-568. In Lone Wolf, the court stated:

> In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indians' tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer was therefore rightly sustained.

Lone Wolf supports the claim of WWP. Here, Congress specifically authorized the granting of lands along the Spokane River for the construction of a water power

project when Congress enacted the Act of March 3, 1905. WWP constructed such a project which was clearly contemplated and authorized by Congress. If the Tribe has suffered any damage by virtue of such grant made by the United States and such authority granted by the United States, the only remedy for the Tribe was against the United States. Furthermore, in order for the Tribe to obtain such a remedy against the United States, Congress would be required to authorize litigation for such a remedy. Of course, Congress did authorize the making of such a claim by the Tribe against the United States when Congress enacted the Indian Claims Commission Act in 1946. 25 U.S.C. § 70a, et seq. Since the claim arose prior to 1946 and since the Tribe either made and recovered for such a claim or neglected to make such a claim, such claim is now barred under the Indian Claims Commission

Act. 25 U.S.C. § 70u. It seems clear in this case that the lands granted to David Wilson and WWP were no longer considered to be necessary in the Spokane Indian Reservation. That is the reason Congress authorized such grant. Such conclusion is also consistent with the policy of the United States Government and the Tribe which was for the Spokane Indians to adopt the ways of the non-Indians and to begin farming.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). The Oneida case involved a suit by the Oneida Indians to recover land which had been granted by the Indians to the State of New York without approval of Congress as required under the Trade and Intercourse Act of 1793. Id. at 229. The Oneida case did not involve the granting of land under specific authority of an act of Congress. Furthermore, some of the language used in

the case appears to be inconsistent with the language of the court used in the Rosebud case. In the Oneida case, there was not only an absence of plain and unambiguous language authorizing the granting of lands, but there was no act of Congress which authorized the grant. In the case before this Court, the Tribe was never involved in the grant of rights made by the United States to David Wilson and WWP. Rather, the granting of such rights was specifically authorized by Congress and was expressly made by the actions of Interior as authorized by Congress. The Oneida case does not have any application to the facts in this case.

Washington v. Fishing Vessel Ass'n, 443 U.S. 468 (1979). This Fishing Vessel case deals with the relative rights of Indians and non-Indians with respect to salmon fishing. The case deals with several Indian treaties which were duly

ratified by the Senate and which contained specific language providing Indians with:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory ....

Such language appeared in many Indian treaties. The language is included in the treaty under consideration in United States v. Winans, 198 U.S. 371, 377-378 (1905) and in Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968) and in many other cases. In Winans, supra, the Court was construing an Indian treaty which provided:

> All of which tract shall be set apart, and so far as necessary, surveyed and marked out, for the exclusive use and benefit of said Confederated Tribes and Bands of Indians as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian Department be permitted to reside upon said Reservation .... (Emphasis added.)

It is clear from the Indian treaties which have been construed by the United States Supreme Court that if the setting aside of a fishery for the benefit of the Indians is intended, the United States Government used specific language to show such intent. For example, in Winans, the treaty at issue specifically authorized the President of the United States to set aside an area six miles square at the confluence of two rivers for the specific purpose of providing a fishery for the Yakima Indians. Winans, supra, at 378. No similar provision appears anywhere in connection with the Tribe. Furthermore, it is of particular importance to note that no Congressional action ever approved the setting aside of the Spokane River as a fishery or for the exclusive use of the Spokane Indians. Indeed, the language of the 1881 Executive Order does not even contain words which indicate that the

Spokane Indian Reservation was intended to be for the "exclusive use and benefit" of the Spokane Indians.

Menominee Tribe v. United States, 391 U.S. 404 (1968). The Menominee case involves an 1854 treaty. Id. at 405. The case involves a claim before the United States Court of Claims whereby the Menominee Tribe was making a monetary claim for the taking of fishing and hunting rights from the Tribe by virtue of a Termination Act. The history of the treaty is set forth in Menominee Tribe of Indians v. United States, 179 Ct.Cl. 496, 388 F.2d 998, 1001-1002 (1967). The United States Court of Claims held that the treaty language which states that the United States "agrees to give, and do hereby give, to said Indians ..." certain lands which were "to be held as Indian lands are held" was intended to include all hunting and fishing rights within

those lands. Id. at 1002 and 391 U.S. at 406.

The United States Supreme Court also took note of the fact that the Solicitor General compared the treaty of Wolf Creek for the Menominee Tribe with language used in other treaties to reach the same conclusion. It should also be noted that the Wisconsin Supreme Court had previously reached the same conclusion that the Menominee Tribe held all hunting and fishing rights in the treaty Indian reservation. Id. Under these circumstances, the Menominee Treaty at Wolf Creek can be compared with the treaty discussed in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). Where there is a treaty or Act of Congress which appears to grant specified lands to Indians for their exclusive use, the Indians are generally deemed to own such lands and any

diminution of Indian rights or any taking of such rights or lands must be clearly intended and compensated.

Again, however, the circumstances considered in the Menominee cases do not, in any way reflect, the circumstances considered herein. Here, there is no treaty and there is no Congressional recognition or provision for rights in the Spokane River or for a fishery in the Spokane River. Indeed, it is obvious that under the Act of March 3, 1905, Congress intended to provide for the granting of rights so that water power projects could be constructed on the Spokane River. Congress intended to remove any impediments with respect to the construction of such projects under the 1905 Act.

In addition, Dellwo Exhibit No. 6 at pp. 2 and 3, and Exhibit 7 at pp. 7 and 8 clearly show that the local Indian agent

and the Commissioner of Indian Affairs both knew that the construction of the proposed project would dam the Spokane River and would destroy any fishery that may have existed in the Spokane River. Yet, the Indian agent and the Commissioner of Indian Affairs expressly approved the application and expressly recommended that Interior approve the application filed by David Wilson which provided for the construction of a water power project. From all of this, it is clear that neither the President or the Congress or Interior ever provided for, or intended to provide for, or ever recognized Indian ownership of the Spokane River or any fishery in the Spokane River.

Mattz v. Arnett, 412 U.S. 481 (1973). Mattz arose from the confiscation of fish nets by California. The Indian reservation at issue was established by an 1855 Executive Order which was specifically

authorized by an Act of Congress. The issue was whether or not the activities of an Indian in the Klamath River occurred in "Indian country" as that term is defined under 18 U.S.C. § 1151. It should also be noted that an 1864 Act of Congress provided for setting aside additional tracts by the President. Furthermore, an 1891 Executive Order was issued arguably pursuant to the 1864 Act, which Executive Order enlarged the reservation to include the original Klamath Indian Reservation. Id. at 493. By an 1892 Act, the Hoopa Valley Reservation, which included the original Klamath Indian Reservation, was opened to homesteading with the proceeds to be placed in a fund to be used for the benefit of the Indians. Id. at 495. Finally, in 1958, certain lands which were not acquired under the homestead laws, were returned to the Indians. Id. at 496, fn. 17. The 1892 Act provided for

allotment of the Indian Reservation under the Dawes Act of 1887 and then provided for the homesteading of the remaining unallotted lands with the funds to go to the Indians. Id. at 502. Under all of these circumstances, the Court concluded that the Hoopa Indian Reservation had not been terminated or diminished. However, Mattz is not analogous to the Spokane Tribe case.

In Mattz, the Court was considering an Indian reservation established pursuant to Act of Congress. It is clear that under such circumstances, the Indians had a compensable interest in the lands. Here, the Spokane Indian Reservation was set forth in an 1881 Executive Order which was never approved or ratified by Congress. The Tribe never had a compensable interest in the lands described in the 1881 Executive Order. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942).

There is no public policy reason to recognize any Indian interest in the Spokane River and lands associated with the Little Falls hydro-electric development. There has been no Presidential or Congressional recognition of the Tribe's claim to the Spokane River or any fishery in the Spokane River. Rather, Congress has authorized and Interior has approved and granted lands and rights necessary for the construction, operation and maintenance of the Little Falls hydro-electric development.

It should also be noted that if it is assumed that the Spokane River is navigable, as has sometimes been alleged by the Tribe under the holding of Montana v. United States, 450 U.S. 544 (1981), there must be some expressed intent under some treaty prior to 1871, or under some Act of Congress before it can be determined that a navigable river was

conveyed to the Tribe. There is a very strong presumption against such a conveyance.

Certainly, under the holding of Sioux Tribe v. United States, supra, without an Act of Congress, or without a treaty which expressly provides for such a conveyance, it cannot be assumed or determined that such a conveyance of a navigable water ever occurred. A description as set forth in the 1881 Executive Order cannot amount to a conveyance or recognition in the Tribe of any interest in the Spokane River or any alleged fishery in the Spokane River.

The foregoing notwithstanding, does the Act of March 3, 1905, recognize some interest in the Tribe in the Spokane River? The answer is clearly no. The Act of March 3, 1905, taken together with the compensation provisions of the Act of March 2, 1899, clearly provide that a

water appropriator under Washington law can acquire whatever rights and lands are necessary for the construction, operation and maintenance of a water power development on the Spokane River by complying with Washington law and by making an application to Interior in compliance with all applicable regulations, and by paying the amounts determined to be due by Interior. The record here and the record before the Court in WWP v. FERC, 775 F.2d 305 (D.C.Cir. 1985) clearly shows that David Wilson and WWP complied with all laws and regulations and paid all sums due under the Act of March 3, 1905, and acquired all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls hydro-electric development. (See the patent attached to the Affidavit of Jerry K. Boyd dated October 19, 1989.)

It should be noted that although it was clearly contemplated that a dam would be built on the Spokane River, there was no provision in the 1905 Act for compensating the Spokane Indians with respect to the Spokane River and any fishery alleged to be in such Spokane River. It is obvious from all of the treaties and statutes referred to in all of the various cases cited by the Tribe in its Memorandum, that if the Tribe had any recognized interest in the Spokane River and if the Tribe had any fishery which was recognized in the Spokane River, the United States Government and Congress would have either protected such right or provided for compensation.

The clear implication from the lack of any provision expressly protecting the Spokane River or any fishery alleged to be in the Spokane River is that neither Congress nor the President nor any other

authorized person of the United States Government ever acknowledged or recognized that the Tribe ever held any interest in the Spokane River or in any fishery alleged to be in the Spokane River.

It is also clear that the Tribe cannot exercise jurisdiction over the Little Falls hydro-electric development. Montana v. United States, supra at 561-563; and Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ___, 106 L.Ed.2d 343, 359, 374 (1989). Under these circumstances, particularly where this project was specifically authorized by Congress, and is either not a part of the reservation or, at most, is on the southernmost edge of the reservation, and where, in order to access the project, there is no need to make any contact with the reservation whatever since there is a road or highway which crosses the Spokane River from the

south within land owned by WWP, there is no reason for the Tribe to exercise any jurisdiction whatever over the project. This fact should not be overlooked when the Court is considering whether or not the 1881 Executive Order Indian Reservation includes the Little Falls hydro-electric development. There can be no doubt that if this Court concludes that the issue of extinguishment or diminishment is before this Court in this matter and if the Court concludes that the Little Falls hydro-electric development is within the Spokane Indian Reservation, the Tribe will then argue in the Indian tax case that such inclusion within the Spokane Indian Reservation authorizes the Tribe to impose a very large business and occupation tax on WWP with respect to such project.

IV. CONCLUSION

Appellee Washington Water Power Company believes that the trial court was correct in dismissing this action on the stated ground of collateral estoppel. Other reasons to affirm such dismissal are advanced in this Brief.

If this Court affirms, the request by the Tribe for judgment in its favor remains moot. However, even if this Court reverses, there is no basis for granting judgment to the Tribe. Material fact questions preclude summary judgment, the Tribe's assertions of law are incorrect, and, finally, this Court should not "review" matters never decided below.

DATED this __ day of _____, 1991.

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